

**TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**October Term, 1927**

**No. 14**

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**MILLARD C. CLEGG, PLAINTIFF IN ERROR,**

**CITY OF JACKSON**

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**REPORT TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

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**FILED NOVEMBER 12, 1927**

**(22,740)**



(30,749)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 228

MILLSAPS COLLEGE, PLAINTIFF IN ERROR

CITY OF JACKSON

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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[fol. 1] [Captions omitted]

[fol. 2] **IN CIRCUIT COURT OF HINDS COUNTY**

PETITION—Filed Sept. 13, 1923

To the Mayor and Commissioners of the City of Jackson, Miss., Hinds County, Mississippi

Comes Millsaps College, a corporation of the State of Mississippi, domiciled in the City of Jackson, Hinds County, Mississippi, and petitions the Council of the City of Jackson to strike, abate and hold for naught the assessment for taxes made against it on its two pieces of property on Capitol Street in the said City of Jackson, the said assessments against the said two pieces of property being as follows:

The assessment of one of said pieces of property is found on Page 140 on lines seven and eight of the realty assessment roll of the City of Jackson for the year 1923, and is as follows:

84½ x 100 ft. N. & S. on Roush St. N. E. cor. Lot 16 W. J. Sec. [fol. 3] 3 T. 5 R. 1 E., Assessed valuation \$82,000.00

The assessment of the other piece of property is found on Page 145 at lines twenty-two and twenty-three of said roll, and is in words and figures as follows:

63.33½ ft. front x 110 ft. N. & S. of 10 a lot 1 N. E. of Buie & W. of Dreyfus & Hart, assessed valuation \$18,000

Petitioner shows that said assessments should be struck, abated and held for naught because the property so assessed is, under Section Five of the Charter of said College, exempt from all State, County and Municipal Taxes, that its charter was granted to it by the Legislature of the State of Mississippi, and approved February 21st, 1890. A copy of said Charter of Incorporation is attached hereto marked Exhibit "A" and asked to be made a part hereof as fully as copied herein in full. That organization was had under said charter and the said charter accepted by the said Millsaps College on June 5th, 1890, and various and sundry gifts, grants and donations were thereupon and subsequently made to the endowment fund of said college.

Said charter is a contract between the State and said college and covers the property involved herein. Said taxes were levied under Section 4251, Code 1906, which was passed subsequently to the granting of said charter. Said section, therefore if given effect as taxing said property impairs the obligation of said contract in violation of Section 10 Art. 1 of the Constitution of the United States forbidding a state passing a law impairing the obligation of a contract.

Petitioner further shows that by deed of date June 27th, 1908 and duly executed and delivered on said date R. W. Millsaps donated the [fol. 4] last piece of property above described to said Millsaps College, and recited as the consideration therefor the aid that was thereby to be given to the endowment of said College. A copy of said deed is

filed herewith as Exhibit "B" hereto and asked to be taken as a part hereof, and under date of March 24th, 1933 the said R. W. Millsaps, for the same consideration as recited in the last mentioned deed, donated the first piece of property above described to the said College by deed duly executed and delivered on said date. A copy of said deed is filed herewith as Exhibit "C" hereto and asked to be taken as a part hereof.

Petitioner shows further that the said R. W. Millsaps departed this life on the 29th day of June, 1916, and that thereupon the said College became the owner in fee simple of the said two pieces of property described in said two deeds and sought to be assessed as above described, and with all interest in and to the premises, tenements and hereditaments thereunto belonging. That thereupon the said two buildings, with a proper valuation thereupon, was placed to the productive endowment account of said College. That in all reports made to the educational boards, and in any other reports requiring a statement as to the amount of the endowment fund, of said Millsaps College the said two buildings were included therein at a proper valuation as a part of the said endowment; that the said two buildings are now and have been since the death of the said R. W. Millsaps, in every way a part of the productive endowment of said College just as if the same valuation were in bonds or any other kind of securities or assets; that the said two buildings are rented out and all and every part of the revenue derived from the said buildings are used to defray the operating expenses of the said Millsaps College, that none of the revenue [fol. 5] derived therefrom is used for any other purpose; that the said buildings constitute a part of the permanent endowment fund of said College, and the revenues therefrom will always be used to defray the running and operating expenses of the said College.

Petitioner shows further that the said Millsaps College is a corporation which conducts and operates a college for the education of the youth of the State, and that the said College has, since its organization under its charter, been kept open and maintained, and is now kept open and maintained, for the purposes contemplated in its act of incorporation, as is provided it shall do in Section Five of its said charter in order to be entitled to the exemption from taxation therein contained. The said College has faithfully carried out all of the provisions contained in its said charter.

The doors of said College are open to both sexes, and all creeds and nationalities except the colored race. Said College is not operated for profit and no profit is made. The cost to each student is reduced to the lowest point, the tuition for each student being only \$75.00 per year. All the dormitories are operated on a co-operative basis, each student paying only his pro rata share of the cost, no profits whatever obtaining to the College. The income from the tuition fees, which is the only income from students, furnishes only a small part of the money necessary for the operation of the College, the balance coming from gifts and the income from the endowment fund, a part of which income is from rentals of said

buildings. The sons and daughters of ministers of the Gospel of all denominations and ministerial students of all denominations are admitted free of tuition. In addition the College gives free [fol. 6] tuition to many poor but deserving students. At the present session the College is giving free tuition to 83 students, 28 being ministerial students, 27 children of ministers, 28 to poor but deserving boys. In addition a revolving loan fund is maintained, which helps about 15 others. The total enrollment of students for the present session is 330.

Petitioner shows that for the above reasons, and under the laws of the State of Mississippi, the said College is entitled to have the said pieces of property exempt from taxation, and, therefore, moves this Honorable Council to strike, abate and hold for naught the said two assessments complained of.

Millsaps College, by Scott & Scott, Attorneys.

[File endorsement omitted.]

#### EXHIBIT "A" TO PETITION

##### An Act to Incorporate Millsaps College and for Other Purposes.

Section 1. Be it enacted by the Legislature of the State of Mississippi That John J. Wheat, Samuel M. Thomas, Thomas J. Newill and Rufus M. Staudifer, members of the North Mississippi Conference of the Methodist Episcopal Church, South, and Garvin D. Shands, David L. Sweetman, James B. Streeter and John Trice, lay members of said church within the bounds of said Conference, and Thomas J. Mellen, Warren C. Black, Alexander F. Watkins and Charles G. Andrews, members of the Mississippi Conference of said church, and Marion M. Evans, Luther Sexton, William L. Nugent [fol. 7] and Reuben W. Millsaps, Jackson, lay members of the said church within the bounds of the said Mississippi Conference, and Bishop Charles B. Galloway, be and they are hereby constituted a body corporate and politic by and under the name and style of Millsaps College, and by that name they and their successors may sue and be sued, plead and be impleaded, contract and be contracted with, and have a common seal and break the same at pleasure, and may accept donations of real and personal property for the benefit of the college hereafter to be established by them, and contributions of money or negotiable securities of every kind, in aid of the endowment of such college, and may confer degrees and give certificates of scholarship, and make by-laws for the government of said college and its affairs, as well as for their government, and do and perform all other acts for the benefit of said institution and the promotion of its welfare, that are not repugnant to the constitution and laws of this State or of the United States, subject, however, to the approval of the said two conferences.

Section II. That as soon as convenient after the passage of this act, the persons named in the first section thereof shall meet in the city of Jackson, in this state, and organize by acceptance of the charter, and the election of Bishop Charles B. Galloway as their permanent president and of such other persons as they may determine, to fill the offices of vice-president, secretary and treasurer, and shall prescribe the duties, powers and terms of office of all of said officers, except as to the term of their said president who shall hold office during life or good behavior, or so long as he may be physically able to discharge his duties. They shall also select by lot from [fol 8] the lay and clerical trustees from each of said conferences, one half who shall be trustees of said college for three years and until their successors are elected, and the other half, not so selected, shall continue in office for the term of six years and until their successors are chosen as hereinafter mentioned. Upon the death, removal or resignation of said Galloway, or his permanent physical disability to discharge the duties of his office, the said trustees may elect their president, and prescribe his duties, powers and term of office.

Section III. That the said trustees shall before the meeting of said conferences next before the expiration of the term of office of any of their number, notify the secretary of said conference thereof and the vacancies shall be filled by said conferences in such way and at such time as they may determine, and the persons so elected shall succeed to the office, place, jurisdiction and powers of the trustees whose terms of office have expired. And the said corporation and the college established by it, shall be subject to the visitatorial powers of the said conference at all times, and the said college, its property and effects shall be the property of said church under the special patronage and jurisdiction of said conference.

Section IV. That the said trustees, when organized as heretofore directed, shall be known by the corporate name set out in the first section of this act and all money, promissory notes and evidences of debt heretofore collected under the direction of said conferences for said college, shall be turned over to and received for, by them [fol 10] in their said corporate name, and the power of all such notes and evidences of debt shall endorse and assign the same to the corporation herein provided for, which shall thereafter be vested with the full legal title thereto, and authorized to sue for and collect the same. The said corporation shall have the power to select any appropriate town, city or other place in this State, at which, to establish said college and to purchase grounds, not exceeding one hundred acres, as a building site and campus therefor, and erect thereon such buildings, dormitories, and halls as they may think expedient and proper, to subserve the purposes of their organization, and the best interest of said institution, and they may invite propositions from any city, or town, or individual in this State for such grounds, and may accept donations or grants of land for the site of said institution.

Section V. That the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college, and the buildings, halls, dormitories there erected, and the endowment fund contributed to said college, shall be exempt from all State, county and municipal taxation, so long as the said college shall be kept open and be maintained for the purposes contemplated by this act, and no longer.

VI. That the cost of education shall, as far as practicable, be reduced by said corporation to the lowest point consistent with the efficient operation of said college, and to this end reports shall be made to the said conference from year to year, and their advice in that behalf taken, and every reasonable effort shall be made to bring a collegiate education within the reach and ability of the poorer [fol. 10] classes of this State.

Section VII. That this act take effect and be in force from and after its passage.

Approved February 21, 1890

#### EXHIBIT "B" TO PETITION

In consideration of the aid thereby to be given to the endowment of Millsaps College, I do hereby donate, and convey and warrant unto said Millsaps College the following described lands, lying and being in the City of Jackson, County of Hinds, and State of Mississippi, to wit: first, that certain lot or tract of land fronting thirty feet on the north side of Capitol Street, and running back northerly One Hundred Ten (110) feet, which was conveyed to me by C. A. Fransoli and his wife, Josephine Fransoli, by their two deeds of date July 1st, 1903 and April 3rd, 1905, recorded respectively in Deed Book 36, page 586, and in Deed Book 46, page 33, in the Chancery Clerk's office of Hinds County, Mississippi, First District; secondly, that certain lot or tract of land fronting Thirty Three and 45/100 (33 45/100) feet on the north side of Capitol Street, and running back northerly One Hundred Twenty Seven and 5/10 (127 5/10) feet, which became my property in severalty on the 12th day of July, 1904, by the certain deed of partition executed on that date by and between C. H. Alexander, Ben Hart and myself, and which deed is recorded in Deed Book 44, page 43, of the Record of Deeds in the Chancery Clerk's office of Hinds County, Mississippi, First District; [fol. 11] thirdly, also all the rights, tenements and hereditaments unto the said two premises appertaining, including all of my title and interest in and to that certain party wall built, and the future right to build and enjoy, conveyed to and vested in me by the certain contract executed between C. A. Fransoli and myself on April 24th, 1905, and recorded in Deed Book 45, page 211, in the Chancery Clerk's office aforesaid, and also including all of my title and interest

in and to that certain party-wall built, and the future right to build and enjoy, conveyed to or vested in me by that certain contract executed between Ben Hart and myself on the 2<sup>nd</sup> day of June, 1906, and recorded in Deed Book 50, page 247, in the Chancery Clerk's office aforesaid.

Saving and excepting, however, from this donation and conveyance, to myself and to my assigns, an estate for the term of my own natural life in and to all of the premises, tenements and hereditaments hereby donated and conveyed, such life tenant to pay off and discharge during such life tenancy all taxes and local assessments on the whole property, and to keep the buildings thereon insured in an amount not less than Fifteen Thousand Dollars (\$15,000.00) if obtainable and pay the whole premiums thereon.

Witness my signature, this 27<sup>th</sup> day of June, 1908.

R. W. Millsaps.

Acknowledged properly and filed for record in office of Chancery Clerk of Hinds County, Mississippi on June 27<sup>th</sup>, 1908, and recorded in Book 50 at page 305.

[fol. 12]

#### EXHIBIT "C" TO PETITION

In consideration of my interest in the cause of Christian education and in consideration of the aid thereby to be given to the endowment of Millsaps College, I do hereby donate, and convey and warrant unto said Millsaps College the following described real estate situated in the City of Jackson, County of Hinds, State of Mississippi, to-wit: "East part of Lot Sixteen (16), District No. 3 West Jackson, fronting 84.5 feet on Capitol Street on the S. W. corner of Capitol and Roach Street, West Jackson and running back southward 100 feet and bounded on the East by Roach Street and on the West by the 2 story building of mine now called the Dixie Theatre, and being the same lot on which the 6 story bank and office building and the 2 one-story brick stores adjoining known as the Millsaps buildings are situated, saving and excepting however from this donation and conveyance to myself and to my assigns an estate for the term of my natural life in and to all of the premises, tenements and hereditaments hereby donated and conveyed, as witness my signature this 24<sup>th</sup> day of March, 1913.

R. W. Millsaps.

STATE OF MISSISSIPPI

County of Hinds

Personally appeared before the undersigned a Notary Public in and for Jackson, Miss. the within named R. W. Millsaps who acknowledged that he signed and delivered the foregoing deed as his own act and deed and for the purposes and consideration therein mentioned and on the day and year therein mentioned.

Given under my hand and seal of office, the 24th day of March, 1913.

Amos R. Johnston, Notary Public.

Filed for record on June 10th, 1913 and recorded in Book 87, P. 42 in office of Chancery Clerk, Jackson, Mississippi.

[fol 13] BEFORE COUNCIL OF CITY OF JACKSON

JUDGMENT—Filed Sept. 13, 1923

This day this cause having come on for hearing by the Council of the City of Jackson, Hinds County, Mississippi, this being a regular meeting day of the said Council, on the petition of Millsaps College, a corporation domiciled in the City of Jackson, Hinds County, Mississippi, to strike, abate and hold for naught the assessment for taxation made against said Millsaps College on its two pieces of property on Capitol Street, which are assessed as follows:

The assessment of one of said pieces of property is found on Page 140 on lines 7 and 8 of the realty assessment roll of the City of Jackson for the year 1923, and is as follows:

84½ x 100 ft. N & S. on Roush St. N. E. cor. Lot 16, W. J. Sec. 3 T. 5 R. 1 E. Assessed valuation \$82,000.00.

The assessment of the other piece of property is found on page 145 at lines 22 and 23 of said roll, and is in words and figures as follows:

63.31 2 ft. front x 110 ft. N & S. of 10 a. lot 1 N. E. of Buie and W. of Dreyfus & Hart. Assessed valuation \$18,000.

And it appearing that the said two pieces of property have been assessed by the City of Jackson as above shown, and all the issues having been presented to this Council in the matter of said assessment, and having been thoroughly considered by the said Council, and this Council being of the opinion that the said two assessments should stand, the said petition is hereby denied and the said assessments will not be struck, abated and held for naught.

Ordered and adjudged, this the 12th. day of September, 1923.

[File endorsement omitted.]

[fol 14] BEFORE COUNCIL OF CITY OF JACKSON

CLERK'S CERTIFICATE—Filed Sept. 13, 1924

I, A. J. Johnson, Clerk of the Council of the City of Jackson, do hereby certify that the following assessment, namely, land assessment for the City of Jackson for year 1923:

Page 140, lines 7 and 8:

"Millsaps College.—84½ x 100 ft. N. & S. on Roush St. N. E. cor. lot 16 W. J. Sec. 3 T. 5 R. 1 E. Assessed val. \$82,000.00"

Page 145, lines 22 and 23:

"Millsaps College.—63 31.2 ft front x 110 ft. N. & S. of 10 a lot 1 N. E. of Blue and W. of Dreyfus & Hart. Assessed val. \$18,000.00."

is a true and correct copy of the assessment complained of by Millsaps College, as the same appears on the land assessment roll for the year 1923 of the City of Jackson, Mississippi.

Given under my hand and seal of the City of Jackson, This the 13th. day of September, 1923

A. J. Johnson, City Clerk.

[File endorsement omitted.]

[fol. 15] BEFORE COUNCIL OF CITY OF JACKSON.

PETITION FOR APPROVAL — Filed Sept. 13, 1923

To the Honorable A. J. Johnson, clerk of the City of Jackson, Mississippi:

On the 12th. day of September, 1923, at a regular meeting of the Council of the City of Jackson, Mississippi, Millsaps College, a corporation domiciled in the City of Jackson, Mississippi, presented to the said Council its petition, to which reference is hereby made, protesting against the assessment for taxation of certain property described in said petition, which has been assessed by the City of Jackson for taxes for the year 1923, and praying that said Council would adjudicate said properties to be exempt from taxation for the reasons set forth in said petition, and would order the assessment thereof abated and stricken from said rolls. On the 12th. day of September, 1923, as more fully shown by reference to the Minutes of said Council of that date, recorded on Page — of the records of Minutes of said meeting, the said City Council passed an order rejecting said petition and sustaining said assessment.

The taxes assessed against said land for the year 1923 will be \$2250.00, which is the amount in controversy. The said meeting of the said Council, which was a meeting provided by law for the equalization of taxes, and the adoption of the assessment roll, finally adjourned on the 13th. day of September, 1923.

The said Millsaps College, being aggrieved by the aforesaid action and orders of the said City Council in finally assessing said property for taxation and refusing to abate said assessment, does now appeal therefrom to the next term of the Circuit Court of Hinds County, and in compliance with the statute does now tender an appeal bond [fols. 16 & 17] in the sum of \$4,500.00 conditioned according to law,



with sufficient sureties thereon, and said appellant now requests that you, as Clerk aforesaid, approve and file said appeal bond, and that you make a true copy of all papers on file, and all orders and assessments relating to the matter in controversy, and that you file such copy, certified by you, together with said bond, in the office of the Clerk of the Circuit Court of said County, on or before the next term of said Circuit Court, in manner and form as provided by law.

Millsaps College, by Frank T. Scott, Attorney.

[File endorsement omitted.]

BOND ON APPEAL FOR \$4,500.—Approved and filed Sept. 13, 1923;  
omitted in printing

[fol. 18] BEFORE COUNCIL OF CITY OF JACKSON

#### CLERK'S CERTIFICATE

I, A. J. Johnson, Clerk of the City Council of the City of Jackson, Mississippi, do certify that the within and foregoing — pages contain a whole, true and correct copy of the petition for abatement of assessment, and striking from the land rolls for 1923 of the City of Jackson, Mississippi, lands assessed by the City of Jackson to Millsaps College, of the order of the Board rejecting said petition, the original petition for appeal, the original appeal bond, and certified copy of the assessment complained of as the same appeared from the records and dockets and files of papers now on file in my office.

Given under my hand and the seal of the City of Jackson, this the 13th day of September, 1923.

A. J. Johnson, City Clerk.

[fol. 19] IN CIRCUIT COURT OF HINDS COUNTY, THE FIRST JUDICIAL DISTRICT, MISSISSIPPI

MILLSAPS COLLEGE

VS

CITY OF JACKSON

#### AGREED STATEMENT OF FACTS AND WAIVER OF JURY

It is hereby mutually agreed by and between the attorneys representing Millsaps College and the City of Jackson that the matters and things set forth in the Petition of Millsaps College, and the

amendments and exhibits thereto, are true and correct, and it is agreed for the case to be tried before the Judge of the Court, a jury being waived, with the facts set forth in the said Petition and amendments and exhibits thereto as the agreed statement of facts in this case.

Scott & Scott, Attorneys for Millsaps College. Green & Green,  
Attorneys for City of Jackson.

[fol 20]

IN CIRCUIT COURT OF HINDS COUNTY

[Title omitted]

### OPINION

This is an appeal by Millsaps College from an order of the Council of the City of Jackson overruling its motion to strike from the City Assessment Roll two certain lots situated therein occupied by store houses and office buildings wholly disconnected from the college and not used for college purposes, conveyed by Major R. W. Millsaps in consideration of the and thereby to be given to the endowment fund of the college.

The ground upon which this motion is based is an exemption contained in the fifth paragraph of the Act of its incorporation approved in February 1860.

The chief question in this case is whether or not under the Constitution of 1860 the Legislature had power to grant an exemption from taxation that applied alone to a single person or corporation.

Two sections of the Constitution of that time bear upon this question. Section 13 provides, "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals," and Section 20 is, "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value to be ascertained as provided by law."

Under these provisions equal and uniform taxation as required. All property of the classes selected by the Legislature to bear the burden of taxation must be taxed according to value and no discrimination can be made in favor of any person or corporation [fol 21] whereby his or her property of the species selected may escape the burden imposed upon others whose property is similarly employed.

In the case of *Vicksburg Bank vs. Worrell*, 67 Mississippi, 47, the court held that, "The legislature may select the subject of taxation and everything not designated as taxable is exempt for the time being. The subject of taxation may be classified at the discretion of the legislature, and if all of the same class are taxed alike there is no violation of the equality and uniformity required by the Constitution."

In *Adams vs. Tombigbee Mills*, 78 Miss. 692, in speaking of a gen-

eral exemption act of specified property, the court said, "It does not select certain persons or corporations and seek individually to extend to them special privileges denied to all others."

In *Adams vs. Railroad Company*, 77 Miss., on page 286 the court said: "Under the Constitution of 1869 the Legislature had the power to select for exemption from taxation certain designated kinds of property \* \* \*. Such exemption of particular kind of property for reasons of public policy the Constitution allowed the legislature to grant, and when granted it applied to such property whether owned by individuals or such corporations."

The exemption contained in this act of incorporation of Millsaps College falls clearly within the rule above announced, and was for that reason never effective.

If anything additional was necessary to be said in passing upon this question, it might be added that under the provisions above set out that "All property shall be taxed in proportion to its value," [fol. 22] which has been construed to mean, all property selected by the Legislature for taxation shall be taxed, etc., there can be no irrepealable exemption from taxation that would prevent future legislative bodies from making such selection of property for taxation as the circumstances of the case and the necessities of the state might require.

*Mississippi Mills vs. Cook*, 56 Miss. 40.

In the case of *Adams vs. Railroad Company*, 77 Mississippi, 273, the court said: "The *Mississippi Mills* case decided no irrepealable exemption was constitutional." And if this college had an exemption under its charter provision that covered the lots here involved, that exemption was repealed by Section 4254, Code 1906, which provides: "The following property and no other shall be exempt from taxation—All property, real or personal, belonging to any college or institution for the education of youth, used directly and exclusively for such purposes."

For the above reasons the council rightly denied the motion to strike the above mentioned lots from the Assessor's Roll of the City of Jackson.

W. H. Potter, Judge.

[fol. 23] IN CIRCUIT COURT OF HINDS COUNTY.

[Title omitted]

#### JUDGMENT.

This day came on to be heard the above entitled cause, and the Court having considered the same, doth order and adjudge:

1st. That the petition of Millsaps College to strike said assessment be and the same is hereby denied, to which action in so doing said College in open court excepted and had its exception.

2nd. It appearing that said property described in said assessment was assessed at the sum of \$100,000.00 and that the taxes lawfully due thereon were \$2,250.00, and that said assessment stand and remain in full force and effect.

And said College having prayed an appeal, the same is allowed upon giving bond as provided by law.

Ordered, adjudged and decreed, this the 27th day of December 1923

W. H. Potter, Circuit Judge.

M. B. 12, Page 70.

[fol. 24 & 25] BOND ON APPEAL FOR \$4,500—Approved and filed Jan. 4, 1924, omitted in printing.

[fol. 26] IN CIRCUIT COURT OF HINDS COUNTY

CLERK'S CERTIFICATE—Filed Jan. 4, 1924.

STATE OF MISSISSIPPI

Hinds County

I, E. D. Fondren, Clerk of the Circuit Court, in and for the County of Hinds, in said State, do hereby certify that the foregoing 25 pages is a true and correct transcript of the record in Cause No. 5296, Millsaps College vs. City of Jackson, as the same remains of record and on file in my office at Jackson, Miss.

Given under my hand and official seal, this the 4th day of January, 1924.

E. D. Fondren, Clerk. J. P. Caldwell, Secy.

Clerk's transcript fee, 25 pages at 25 cts. per page

\$6.25

Citation, bond and certificate

1.25

Binding fee paid by clerk

75

\$10.00

[File endorsement omitted.]

[fol. 27]      IN CIRCUIT COURT OF HINDS COUNTY

[Title omitted]

SUPPLEMENT TO THE AGREED STATEMENT OF FACTS—Filed Feb.  
14, 1924

It is agreed that Major R. W. Millsaps, the grantor in the two deeds, died on the 28th day of June, 1916 and that in the year 1917 the said property described in the said deeds were assessed by the City of Jackson at \$10,000.00 and the taxes thereon paid but under protest as seen below and in the year 1918 at \$80,000.00 and the taxes paid thereon, and in the year 1919 at \$80,000.00 and the taxes paid thereon, and in the year 1920 at \$82,000.00 and the taxes paid thereon, and in the year 1921 at \$82,000.00 and the taxes paid thereon, and in the year 1922 at \$82,000.00 and the taxes paid thereon. The taxes for 1917 were paid under formal protest and the Treasurer of the College, who paid the taxes was under the impression that this protest would hold for the succeeding years.

Scott & Scott, Green, Green & Potter

[File endorsement omitted]

[fol. 28]      IN SUPREME COURT OF MISSISSIPPI

No. 24040

MILLSAPS COLLEGE

VS.

CITY OF JACKSON

ASSIGNMENT OF ERRORS—Filed March 10, 1924

Comes the appellant, and for errors assigns as follows:

1. The lower Court erred in holding that the property was not exempt from taxation and in not giving a decision for the College.

2. The lower Court erred in holding that the exemption clause in the charter was unconstitutional.

3. The lower Court erred in holding that the exemption clause of the said charter was repealable and that if the College had an exemption under its charter that covered the property here involved that said exemption was repealed by Section 4251 Code of 1906.

(a) Because said charter did give a good and valid exemption.

(b) Because section 4251 Code of 1906 did not repeal same.

(c) Because if the said Section 4251 did undertake to repeal same it violated section 10 of Article 1 of the Constitution of the United States forbidding the impairment of the obligation of contracts.

4 The exemption in the charter of Millsaps College covers the property involved in this case and is a contract between said College [fol 29] and the State of Mississippi. The taxes complained of were levied against said property under section 4251 Code of 1906, which was passed subsequently to the granting of said charter. The lower court, in upholding the assessment complained of, gave effect to said section as subjecting the property herein to taxation. Said Section 4251, Code of 1906 therefore impairs the obligation of said contract, and is unconstitutional and in violation of Section 10 Article 1 of the Constitution of the United States which forbids a state passing any law impairing the obligation of a contract. The lower court, therefore, erred.

Scott & Scott

We hereby certify that we have this day mailed to Green, Green & Potter, Attorneys for appellee, copy of this assignment of error.

Scott & Scott

[File endorsement omitted]

[fol 30]

IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ARGUMENT AND SUBMISSION Sept. 10, 1924

Argued orally by Frank Scott for appellant and Garner W. Cannon for appellee and submitted on briefs by Scott & Scott for appellant and Green, Green & Potter for appellee.

[fol 31]

IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

DECISION Oct. 6, 1924

This case having been submitted on a former day of this term on the record herein from the Circuit Court of Hinds County, First District, and this court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 27th day of December, 1923, be and the same is hereby affirmed and that appellee do have and recover of appellant and W. M. Huse and Thad B. Lampton, surties in the supersedeas bond the costs of this cause in this court and in the court below to be taxed, etc.

[fol 32]

## IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

OPINION—Filed Oct. 6, 1924

SMITH, C. J., In Banc.

This is an appeal from a judgment of the court below approving an assessment for taxes by the City of Jackson of certain real property owned by the appellant and situated in that City. The property was given to the college by the late R. W. Millsaps, the founder of the college, during his lifetime "in consideration," as the deed recites, "of the aid thereby to be given to the endowment of Millsaps College."

The property consists of a lot on which the donor had erected a building which is rented by the college to various tenants for business purposes, and is held by the college, according to the agreement of counsel, as a part of its endowment. Appellant is a corporation and its claim is that the property is exempt under Section V of its charter which provides "that the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college, and the buildings, halls and dormitories thereon erected, and the endowment fund contributed to said college, shall be exempt from all State, county and municipal taxation, so long as the said college shall be kept open and be maintained for the purposes contemplated by this act."

Section I of the charter provides that the corporation "may accept donations of real and personal property for the benefit of the college (fol 33) hereafter to be established, and contributions of money or negotiable securities of every kind, in aid of the endowment of such college." And Section IV provides that the corporation may purchase or accept land, not to exceed one hundred acres, as a building site and campus for the college.

The record and briefs of counsel present several interesting and difficult questions for decision, but there is one which lies at the threshold of the case which must be decided in favor of the college before the other questions can properly be reached, and is: Does the exemption granted by Section V of the charter of the college cover land of the character of that here in question?

The exemption from taxation granted the college covers two classes of property. First, the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college, and the buildings, halls and dormitories thereon erected, and second, the endowment fund contributed to said college. It is admitted by counsel for the appellant and the fact is, that the land here in controversy is not included in the first of these classes, consequently the narrow question presented for decision is: Does the exemption include land held by the college as a part of its endowment?

The endowment of a college is commonly understood as including all property, real or personal, given to it for its permanent support.

If the term is to be so defined here, then practically all of the land which the corporation can hold "for the benefit of the college" will be exempt for all of such property must necessarily be one of two [fol 34] classes. First, the campus and grounds on which the college buildings are situated, or second, land the revenue from which is applied to the support of the college, or in other words, land held as a part of its endowment.

It seems reasonably clear that the term "endowment fund" is here used in a more restricted sense and was not intended to include land, for the specific grant of an exemption on land of a certain character negatives by implication an intention to exempt land of a different character. *State v. Kredman*, 38 N. J. Law, 574. *Expressio unius est exclusio alterius*. Moreover if it was not the intention of the Legislature to restrict the exemption on land to that specifically described in the grant of the exemption but to include also therein land which the college might hold as a part of its endowment, such intention could have been easily placed beyond doubt by a simple provision that all land of the college which it is authorized by its charter to own, shall be exempt from all State, county and municipal taxation.

The endowment of the college is referred to in one other section of the charter and its meaning there is evidently the one intended here for the rule is that "where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and where its meaning in one instance is clear the meaning will be attached to it elsewhere unless it clearly appears from the whole statute that it was the intention of the legislature to use it in different senses." 36 Cyc. 1132, 25 R. C. L. 764. *Green v. Weller*, 32 Miss. 650. Section V of the charter exempts from taxation the "endowment fund contributed to said college." Section I of the charter authorizes the corporation to "accept . . . . one [fol 35] tributions of money or negotiable securities of every kind in aid of the endowment of such college." The "endowment fund" which Section I of the charter contemplates will be "contributed to said college" is composed of money and negotiable securities from which applying the rule just heretofore set out, it follows that property of such character only is included in the exemption of "the endowment fund contributed to said college."

It follows from the foregoing views that we are of the opinion that the exemption of land from taxation granted the appellant by Section V of its charter is restricted to "the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college, and the buildings, halls, and dormitories thereon erected."

Affirmed.

[File endorsement omitted.]



[fol 36]

## IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUGGESTION OF ERROR—Filed Nov. 1, 1924

We respectfully suggest that the Court erred in its construction of the Millsaps College charter with reference to the tax exemption contained therein. Among other things Section Five of the charter provides that the endowment fund of the College shall be exempt from taxation. What is meant by the endowment fund and what is included therein? In the agreed statement of facts it is agreed that the property involved is a part of the endowment fund of Millsaps College. There is and can be no question that real property held for the permanent support of an Institution is properly a part of its endowment fund. The opinion of the Court concedes this; no case can be cited holding a contrary view, the dictionaries, both lay and legal so define it, and the educational world so accepts it. Nothing is better established than the fact that revenue producing real property owned by a College as a part of its permanent property is a part of its endowment fund.

With this in mind let us analyze the charter. For the purpose of the analysis let us ignore for the time being the first clause of Section Five of the charter which provides for exemption of "the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said College." Let us start with Section One of the charter, particularly that part which, in setting forth the general powers of the College, provides as follows: "and may accept the donations of real and personal property for the benefit of the College hereafter to be established by them, and contributions of money or negotiable securities of every kind, in aid of the endowment of such college." We contend that here is specific authority to the corporation to accept real property, personal property, money and negotiable securities of every kind (with emphasis on the every) in aid of the endowment of the College. If we interpret the opinion correctly the Court seems to be inclined to the view advanced by Counsel for the City that the words "in aid of the endowment of such college," referred to and modified solely money or negotiable securities of every kind. We respectfully submit that in order for there to be any force to this view the comma which immediately precedes "in aid of the endowment of such College" must be judicially omitted. Counsel for the City did take the liberty every time he quoted this part of the charter to omit the comma, but we submit there is no justification for omitting out of the statute what the Legislature has placed there, especially when the omission tends to materially affect the meaning. There can be no question that with this comma where it is the words modify everything preceeding which can properly be an aid to the endowment of the College. It does not require a learned lawyer or an expert grammarian to know this. Any school boy who has been taught any-

thing about the rules of punctuation knows that punctuation is employed for the purpose of making clear the meaning sought to be [fol. 38] expressed, and further that the use of the comma in the place here employed makes the following words modify real and personal property, real property, personal property, money and negotiable securities of every kind.

It is furthermore apparent that the phrase "and contributions of money or negotiable securities of every kind" is parenthetically thrown in for the purpose of enlargement and not restriction in order to make it perfectly clear that included in the term "personal property" preceding was meant "money or negotiable securities of every kind." So we have it from the first section of the charter that real property may be accepted by the College in aid of its endowment, and up to this point certainly real property as a part of its endowment is exempt under the endowment exemption of Section Five.

Let us come now to Section Five, the exemption section. Let us remember that the Legislature in talking about an endowment fund is talking about something the meaning of which is well known both as a matter of law and in common acceptance. Still leaving out of consideration for the time the specific exemption given to "lands or grounds, not to exceed one hundred acres, used as a site and campus," let us consider the exemption given to "the endowment fund contributed to said College." There can, of course, be no question as to the meaning of this clause standing alone. It would include any and all property held by Millsaps College as a part of its endowment fund, in which category, of course, the property here involved is included. Now up to this point where is there any doubt as to the meaning of the Legislature as expressed in this charter?

[fol. 39] This question leads us to the fundamental error which we, with the greatest deference, contend the Court has made. We say up to this point there is no doubt. The exemption is to the endowment fund of said College. By agreement and in every other way this building is a part of the endowment fund of Millsaps College. Therefore up to this point there is no escape from the conclusion that this building is exempt as part of the endowment fund of said college. This being true, and the wording of the exemption being absolutely plain, there is no reason for invoking any of the rules that have grown up from time to time in aid of the proper construction of doubtful language. If there were any doubt as to what is included in the words "endowment fund," then it is perfectly proper to invoke such rules in order to solve the doubt, but it is not proper to invoke such rules in order to create a doubt in what is otherwise plain and clear. The Court, however, following the error made by adverse Counsel, invoked a rule that has grown up to aid in the proper construction of doubtful language in order to create a doubt as to what is included in "endowment fund."

The Court says that the fact that there had been a specific grant of an exemption on land of a certain character negatives by implication

an intention to exempt land of a different character, invoking the rule *expressio unius est exclusio alterius*. Now we have no fault to find with this rule. The fault that we find is with its application in this case. We contend that as there is no doubt as to what is generally and commonly included as endowment fund of an Institution there is no ground for bringing in this rule which is one to [fol 40] aid in the construction of doubtful statutes in order to create a doubt as to what is included as the endowment fund to be exempted.

There is no room for construction when the language is clear. No rule of construction was ever formulated to clear up something that is already clear, nor to make ambiguous something that is already clear. The rule *expressio unius est exclusio alterius* is no different from any other rule of construction and interpretation. It is not a substantive law. Says Lewis' Sutherland Statutory Construction, Volume 2, page 916, Section 491, discussing this rule: "This maxim, like all rules of construction, is applicable under certain conditions to determine the intention of the law maker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusions; but otherwise the expression of one or more things is not a negation or exclusion of other things."

However, regardless of these considerations, we think it perfectly clear that the language used in the first clause of Section Five cannot be said to be a specific enumeration of real property as such. It is not a mention of land as such but of "lands or grounds as a site and campus." In other words, what is being specifically enumerated is a site and campus and not land per se. It is impossible to have a campus and site without land therefor. What the Legislature wanted to exempt was the campus and site, but it also wanted to restrict the exemption to one hundred acres of land for said campus and site. There is nothing strange about this. In the preceding section authority was given to purchase only one hundred [fol 41] acres of land for a campus. It is a common thing to limit the size of a campus that a College can have. They are usually located in or near the border of a City, and if Millsaps College had been permitted to hold a large lot of land at and around its present location it could have hampered the growth of Jackson Northward, as indeed it has already partially done even with one hundred acres, so there was every reason to limit this campus to one hundred acres. It was absolutely impossible to limit this exemption to one hundred acres for a campus and site without using the word "land" in some way, so the Legislature chose the most roundabout way possible to enumerate "land" by saying "lands or grounds." Lewis' Sutherland, Vol. 2, Second Edition, Page 924, Section 495, lays down the rule as follows: "If there is some special reason for mentioning one, and none for mentioning a second which is otherwise within the statute, the absence of any mention of the latter will not exclude it." In other words, the Legislature had a well defined reason here for mentioning land. The purpose and the only purpose for mentioning land was to limit the number of acres for a campus and it was im-

possible to do this without mentioning land. Where this reason is apparent even though there was doubtful language to which the rule could be applied, the rule would not apply. Suppose the language had been: "The site and campus of said College and the endowment fund contributed to said College shall be exempt." Under the opinion of the Court, in this event the property herein would have been included in the endowment fund. When, therefore, it becomes apparent that the reason for mentioning "lands" was [fol. 42] for the purpose of limiting the size of the campus and not for limiting the exemption given to the endowment fund, the rule cannot apply.

In addition to the two foregoing considerations, we also submit that the rule does not apply because of the essential difference between an endowment fund for a College and the campus and site. As the opinion of the Court well says: "They are two different characters of property entirely." If the character of real property as a site and campus was the same character as realty as a part of the endowment fund it might be a different question, and the rule could more properly be applied, but land for a campus and site and land as a part of the endowment fund is so far different in character that the mention of land for a campus cannot by implication exclude realty as a part of another generic term, to-wit, endowment fund. Bouvier's Law Dictionary defines endowment as follows: "Now generally used of a permanent provision for any public object, as a school or hospital; by the endowment of such institution is commonly understood, not the lighting or provision of sites for them, but the providing of a fund necessary for their support." To the same effect is Edwards vs. Hall, 6 Iac. Cas. M. & G. Rep. 74 to 94, and to the same effect is Stuley, 1 Lyall, 32 N. J. Law, 300. The opinion of the Court seems to attribute some importance to the fact that the word "contributions" is used in Section One with reference to money or negotiable securities, and that the word "contribute" is used in Section Five describing the endowment fund contributed to said College. We respectfully submit that the language in both sections is too vague to result to such insignificant incident in order to ascertain the meaning. We respectfully submit that the word [fol. 43] "contribute" in Section Five is the broadest term that could have been used, and that if it had been the intention to use language of restriction any other word would have suited better. The Century Dictionary, Volume 2, defines the word "contribute" as follows: "To give or grant in common with others; give to a common stock or for a common purpose; furnish as a share or constituent part of any thing." The same dictionary, Volume 3, defines the word grant "a verb, as follows: 1. To transfer the title or possession in any formal way, specially for a sufficient or valuable consideration, and to make over, especially by deed or writing." As a noun: "1. The act of granting." "A thing granted or conferred, especially something conveyed by deed or patent; in modern use, a conveyance in writing of such things as cannot pass or be transferred by word only, as lands, rents, concessions, titles." Webster's New Internat-

nional Dictionary defines the above terms the same way. In fact, "contribute" is the only word that could have been used in Section Five that does not include both realty and personalty when used as in this charter. Therefore, in using "contribute" which means to give or grant, it is all inclusive. It is equivalent to saying, "and the endowment fund given or granted to said College." We have, therefore, the personalty given and the realty granted to said College as a part of the endowment fund.

The Court in its opinion further says that if it was not the intention to restrict the exemption on land to that used for a site and campus but to include also therein land which the College might hold as a part of its endowment, such intention could have been easily [fol. 44] placed beyond doubt by a simple provision that all land of the College which it is authorized by its charter to own shall be exempt from all taxes, etc. We submit that such a provision could not possibly have expressed the evident intention of the Legislature. In the first place, such a provision and nothing further would not have exempted personal property. In the second place, as we have already seen, the Legislature did not want to exempt more than one hundred acres for a campus and site. In order to restrict the exemption to one hundred acres, it was absolutely necessary to specifically exempt one hundred acres for that purpose. It is no answer to this argument to say that the charter in the preceding Section had already restricted the amount of land for a campus to one hundred acres. It is true it restricted the amount of land the College could purchase for a campus to one hundred acres, but there is no restriction on the amount of the land it could accept as a gift for the purpose of a campus. In the third place, we submit that it is not a proper rule of construction to say that the Legislature did not mean a certain thing because it could have found better language in which to express it. Endowment fund includes realty as well as personalty, and this being true, we contend it is not proper to say that land was not intended to be included therein simply because land was not specifically mentioned as being a part thereof. However, by referring to Section One it will be found that realty was specifically mentioned as an aid to the endowment of said College.

Another point which we desire to impress on the Court is that the property here involved would have been exempt under the general [fol. 45] statute in force at the time this charter was granted. Section 468 of the Code of 1889 was in force, and this Section provided, among others, for the following exemption: " \* \* \* property, real or personal, belonging to any incorporated Institution for the education of youth used exclusively for the benefit and support of such Institution." When it is considered what this corporation was agreeing to do for the State it is hard to conceive that the Legislature intended to give to it a less favorable exemption than was provided for by general statute at the time.

We submit, therefore, that the Court has erred in its construction of this charter.

Respectfully submitted, Scott & Scott, Attorneys for Appellant

[File endorsement omitted]

[fol 46] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER OVERRULING SUGGESTION OF ERROR—Nov. 17, 1924

This cause coming on to be heard on the suggestion of error filed herein and this court having sufficiently examined and considered the same doth order and adjudge that said suggestion of error be and the same is hereby overruled.

[fol 47] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Dec. 5, 1924

To the Honorable Sidney M. Smith, Chief Justice of the Supreme Court of the State of Mississippi:

Your petitioner, Millsaps College, a corporation chartered and organized under the laws of the State of Mississippi, in this its petition for a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Mississippi, respectfully shows unto the Court that during the month of            1923 the City of Jackson, in the State of Mississippi, Defendant in Error, made an assessment of taxes against certain property of the said Millsaps College, to which assessment the said College filed its objection with the Mayor and Commissioners of the said City of Jackson and its petition asking that the said assessment be abated and held for naught. The Mayor and Commissioners of the City of Jackson denied the said petition, from which action an appeal was taken by the said College to the Circuit Court of the First Judicial District of Hinds County, Mississippi. The said Circuit Court, on the 27th day of December, 1923, entered its judgment sustaining the said assessment. An appeal was taken by the said Millsaps College to the Supreme Court of the State of Mississippi, and the said Court sitting in Banc on the 17th day of November, 1924, made a final judgment in the said cause in favor of the said City of Jackson and against your petitioner, in which final judgment certain errors were committed to the prejudice of your

petitioner, all of which will in detail appear in the assignment of errors filed in this cause.

[fol. 48] Petitioner shows unto the Court that the judgment of the Supreme Court of the State of Mississippi rendered against Petitioner and affirming the judgment of the lower Court is now a final judgment of the Supreme Court of the State of Mississippi and that the said Supreme Court of the State of Mississippi is the highest Court in said State in which a decision in said case can be rendered.

Petitioner claims the right to appeal said judgment of the Supreme Court of the State of Mississippi to the Supreme Court of the United States by Writ of Error because in its petition to the Mayor and Commissioners of the City of Jackson, and in the hearing before the said Mayor and Commissioners, and in the Circuit Court of the First Judicial District of Hinds County, Mississippi, when the suit was pending there and at the trial thereof, and in the Supreme Court of Mississippi, when the suit was pending there and at the hearing thereof in the said Supreme Court, by its said petition, its assignment of errors, its briefs and oral arguments there was drawn in question by your petitioner the validity of a certain law of the State of Mississippi, to-wit, Section 4251 Code of 1906, and the authority exercised under the said law of the State of Mississippi on the ground that the said law was repugnant to the Constitution of the United States in this, to-wit:

Your petitioner asserted in its original petition, its assignment of error, and briefs, that by and under its charter granted to it by the Legislature of the State of Mississippi in the year 1890 it was given an exemption from all taxation of the property assessed; that the said charter constituted a contract between the said State and the said College, which was irrevocable and which could not be impaired without violating Section 10 of Article 1 of the Constitution of the United States forbidding a State passing any law impairing the obligation of a contract; that the said taxes were assessed under Section 4251 Code of 1906 which was passed subsequently to the granting and acceptance of said charter; that the said Section 4251 Code of 1906, when used to make the property of said College subject to taxation, violated the said Section 10 or Article 1 of the Constitution of the United States, and was therefore unconstitutional in that it was a law passed by the State of Mississippi which impaired the obligation of said contract.

The decision of the Supreme Court of the State of Mississippi is and was in favor of the validity of the said Section 4251 of the Code of 1906. There was therefore drawn in question in this case the validity under the Federal Constitution of Section 4251 Code of 1906 and the decision of the Court was in favor of its validity.

Wherefore, your petitioner feels aggrieved by the final decision and judgment of the Supreme Court of the State of Mississippi and prays for the allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Mississippi, for the correction therein of the errors complained of, and your petitioner presents herewith an assignment of errors to be presented

and argued in the Supreme Court of the United States and plaintiff in error tenders herewith its formal and duly executed bond with good and sufficient sureties joining in the execution of said bond, said bond being conditioned according to law, and your petitioner prays the approval of said bond, and that a transcript of the pleas and proceedings therein, duly authenticated, may be forthwith, in accordance with law, sent to the Supreme Court of the United States.

And as in duty bound your petitioner will ever pray,

This the 5th day of December, 1924

Robert H. Thompson, Frank T. Scott, Attorneys for Petitioner, Millsaps College

[fol. 50]

IN SUPREME COURT OF MISSISSIPPI

WRIT OF ERROR—Filed Dec. 5, 1924

THE UNITED STATES OF AMERICA, ss.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Because in the record and proceedings, and also in the rendition of judgment of a plea which is in the State Supreme Court of the State of Mississippi, before you, or some of you, being the highest Court of law or equity of the said State, in which a decision could be had in said State between Millsaps College, Plaintiff in Error, Appellant, and the City of Jackson, Defendant in Error, Appellee, wherein was drawn in question the validity of statutes of the State of Mississippi, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity, a manifest error hath happened to the great damage of the said Millsaps College, as by its complaint appears.

Wherefore, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, we do command you, if judgment be thereon given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in our said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this the 5th day of December, A. D. 1924. Done in the City of Jackson, County of Hinds, with the seal of the District



Court of the United States for the Southern District of Mississippi,  
[fol. 51] Jackson Division attached.

Jack Thompson, Clerk of the District Court of the United  
States for the Southern District of Mississippi, Jackson  
Division. (Seal of the District Court, Southern District of  
Mississippi.)

Allowed by Sidney M. Smith, Chief Justice of the Supreme Court  
of the State of Mississippi.

Formal service of foregoing Writ waived and service accepted this  
December 5th, 1924.

Garner W. Green, Attorney of Record for the City of Jackson,  
Defendant in Error.

[File endorsement omitted.]

[fol. 52] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER ALLOWING WRIT OF ERROR AND FIXING BOND—Filed Dec.  
5, 1924.

The above entitled matter coming on to be heard upon the petition  
of the Appellant, Millsaps College, for a Writ of Error from the  
Supreme Court of the United States to the Supreme Court of the  
State of Mississippi, and upon examination of the said Petition and  
the record in said matter, and desiring to give to the Petitioner op-  
portunity to present in the Supreme Court of the United States the  
questions presented by the record in the said matter.

It is ordered that a Writ of Error be and is hereby allowed the  
Petitioner to this Court from the Supreme Court of the United States  
and that the Writ of Error Bond presented by said Petitioner for One  
Thousand Dollars (\$1,000.00) be and the same is hereby approved.

This the 5th day of December, 1924.

Sydney Smith, Chief Justice of the Supreme Court of the  
State of Mississippi.

[File endorsement omitted.]

[fols. 53 & 54] BOND ON WRIT OF ERROR FOR \$1,000.—Approved and  
filed Dec. 5, 1924, omitted in printing.

[fol. 55] CITATION.—In usual form, showing service on Garner W.  
Green, filed Dec. 5, 1924, omitted in printing.

[Title omitted]

## ASSIGNMENT OF ERRORS—Filed Dec. 5, 1924

Plaintiff in Error, Millsaps College, a corporation chartered and organized under the laws of the State of Mississippi, would show unto the Court in this, its assignment of error, that there was manifest error prejudicial to it apparent of record in the proceedings, decision, and final judgment of the Supreme Court of the State of Mississippi in the above entitled matter, in this, to-wit:

First. The said Court erred in not holding Section 4251 of the 1900 Code of the Laws of Mississippi void so far as the taxation of Millsaps College property is concerned, because in conflict with Section 10 of Article I of the Constitution of the United States forbidding a State to pass a law impairing the obligation of a contract, because in the year 1899 the Legislature of the State of Mississippi granted a charter of incorporation to Millsaps College, Plaintiff in Error, which said charter was duly accepted by the said College, and thereby became a contract, under which charter the property of the said College against which an assessment for taxes was made by the City of Jackson, Defendant in Error, was exempted from all State, County and Municipal taxation. The defendant in error, the City of Jackson, made the assessment of said taxes under the said Section 4251 of the Code of 1900 which was passed subsequently to said charter. The said Section, therefore, when used to make the said property of the said College subject to taxation, impaired the obligation of said contract, and the Supreme Court of the State of Mississippi erred in not so holding.

Second. The Supreme Court of the State of Mississippi erred in [fol. 57] holding that the charter of Millsaps College did not by its terms exempt from taxation the property of the College against which an assessment of taxes was made, because the necessary chief of the said decision was to give effect to Section 4251 of the Mississippi Code of 1900, which said Section was passed subsequently to said charter, and which said Section, when used to subject the said property to taxation, impaired the obligation of the contract between Millsaps College and the State of Mississippi, and was thus unconstitutional and void, being in conflict with Section 10 of Article I of the Constitution of the United States.

Third. For other reasons apparent.

Frank T. Scott, Robert H. Thompson, Attorneys for Millsaps College, Plaintiff in Error.

[File endorsement omitted.]

[fol. 58]

## IN SUPREME COURT OF MISSISSIPPI

## CLERK'S CERTIFICATE

I, W. J. Buck, clerk of the Supreme Court of the State of Mississippi, being the Court of said State which has highest, last and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are full, true and correct copies of all the papers, each and all of them constituting the record in the said Supreme Court of the State of Mississippi in the case of Millsaps College v. City of Jackson, No. 24040 on the docket of said court, all of which are now on file in my office and taken together constitute the record in said cause.

Given under my hand with the Seal of said Court affixed at offices in the Capitol in the City of Jackson, Mississippi, this the 9th, day of December, A. D., 1924.

W. J. Buck, Clerk of the Supreme Court of Mississippi. (Seal of the Supreme Court, State of Mississippi.)

I certify that the transcript fee, which includes indexing and certificate \$26.00 has been paid.

W. J. Buck, Clerk.

Endorsed on cover: File No. 30,749. Mississippi Supreme Court, Term No. 228. Millsaps College, plaintiff in error, vs. City of Jackson. Filed December 22nd, 1924. File No. 30,749.



FILED

JAN 2 1928

In the Supreme Court of the United States

CLERK

OCTOBER TERM, 1927

No. 14

14

MILLSAPS COLLEGE, PLAINTIFF IN ERROR,

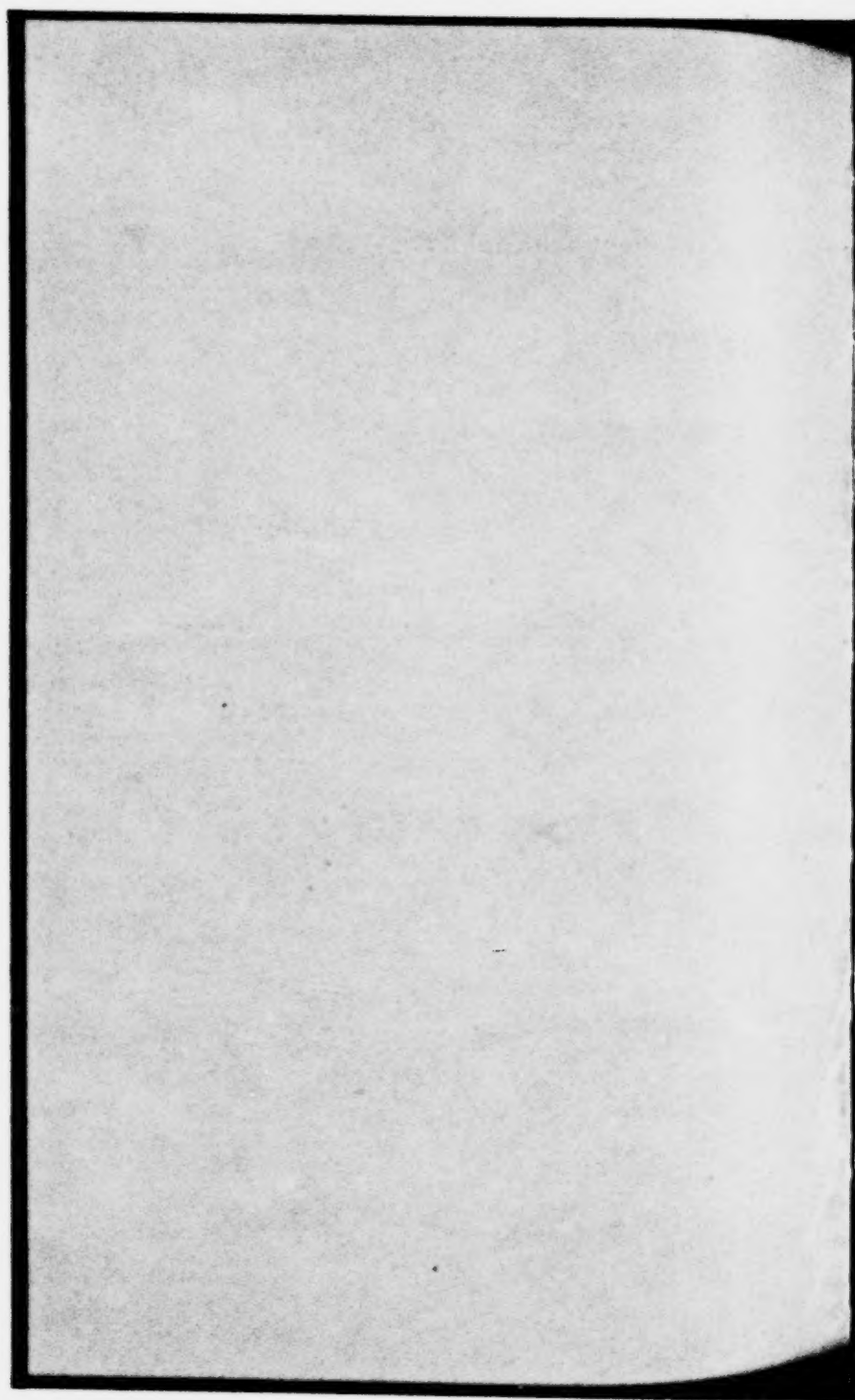
VS.

CITY OF JACKSON.

IN ERROR TO THE SUPREME COURT OF THE STATE  
OF MISSISSIPPI.

BRIEF OF PLAINTIFF IN ERROR.

ROBERT H. THOMPSON,  
W. T. HENSON,  
CHARLES SCOTT,  
FRANK T. SCOTT,  
*Counsel for Plaintiff in Error.*



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For the official report of the opinion of the State  
Court in the case at bar see *Millsaps College v. City of  
Jackson*, 136 Miss. 802.



# In the Supreme Court of the United States

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OCTOBER TERM, 1925.

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No. 228.

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MILLSAPS COLLEGE, PLAINTIFF IN ERROR,  
VS.  
CITY OF JACKSON.

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IN ERROR TO THE SUPREME COURT OF THE STATE  
OF MISSISSIPPI.

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## JURISDICTION.

This case was appealed, by writ of error, from a judgment of the Supreme Court of the State of Mississippi, holding certain property of Millsaps College, plaintiff in error, subject to taxation.

FIRST. The judgment was rendered by the said Supreme Court on October 6th, 1924 (R. 14).

SECOND. The City of Jackson, defendant in error, levied an assessment for taxation against the property for the year 1923. The college filed a petition with the mayor and commissioners of the City of Jackson claiming that said property was exempt from taxation, and

asking that said assessment be vacated. It claimed the exemption under its charter of incorporation granted by the Legislature of the State of Mississippi, and approved February 21st, 1890, a copy of which said charter was filed as an exhibit to the petition. Under Section 5 of this charter the endowment fund of said college was exempt from all state, county and municipal taxation so long as the said college should be kept open and be maintained for the purposes contemplated by the charter. The property assessed is a part of the endowment fund of the college. The petition (R. 1) raised the Federal question involved by alleging the following:

"Said charter is a contract between the state and said college, and covers the property involved herein. Said taxes (meaning the taxes against which objection was being made) were levied under Section 4251, Code of 1906, which was passed subsequently to the granting of said charter. Said section, therefore, if given effect as taxing said property, impairs the obligation of said contract, in violation of Section 10 of Article 1 of the Constitution of the United States forbidding a state passing a law impairing the obligation of a contract."

The City Board denied the petition to vacate the assessment (R. 7), and the College appealed to the Circuit Court of the state.

At the trial of the case in the Circuit Court, by stipulation of counsel, the petition, with exhibits thereto, was adopted as the agreed statement of facts, and the case

was tried before the circuit judge with this petition as the agreed statement of facts (R. 9, 10).

The circuit judge decided the case against the college and held the property taxable, among other things holding:

"\* \* \* And if this college had an exemption under its charter provision that covered the lots here involved, that exemption was repealed by Section 4251, Code of 1906, which provides: 'The following property and no other shall be exempt from taxation \* \* \*. All property, real or personal, belonging to any college or institution for the education of youth used directly and exclusively for such purposes.'"

The college appealed to the Supreme Court, and there, among others, made the following assignment of error (R. 14):

"4. The exemption in the charter of Millsaps College covers the property involved in this case and is a contract between said college and the State of Mississippi. The taxes complained of were levied against said property under Section 4251, Code of 1906, which was passed subsequently to the granting of said charter. The lower court in upholding the assessment complained of gave effect to the said section as subjecting the said property herein to taxation. Said Section 4251, Code of 1906, therefore impairs the obligation of said contract and is unconstitutional and in violation of said Section 10 of Article 1 of the Constitution of the United States which forbids a state passing any law impairing the obligation of a contract. The lower court therefore erred."

It is seen, therefore, that in its original pleadings the college alleged:

(1) That under its charter, which is a contract, the property involved is exempt from taxation;

(2) That the assessment complained of was levied under Section 4251, Code of 1906, which was passed subsequently to the granting of said charter;

(3) That said section, if given effect as taxing said property, impairs the obligation of said contract, in violation of Section 10, Article I of the Federal Constitution, forbidding a state passing a law impairing the obligation of a contract.

It will also be seen that this petition was agreed by counsel to be true, and was adopted as the agreed statement of facts in the case.

It is further seen the circuit judge specifically held that the exemption claimed by the college was repealed by said Section 4251, Code of 1906; and in the Supreme Court the college set up this same Section 4251, Code of 1906, which was passed subsequently to said charter, and claimed that said section, when given effect as taxing said property, impaired the obligation of said contract under the section of the Federal Constitution above referred to.

Said Section 4251, Code of 1906, provides for the various general exemptions allowed in Mississippi and repeals all exemptions theretofore allowed which are not enumerated therein and which are subject to repeal. It provides "The following property *and no other* shall be exempt from taxation, to wit:" It then enumerates



the various exemptions and among them is "All property, real or personal, belonging to any college or institution for the education of youth used directly and exclusively for such purposes." Under this the property involved, being an office building not actually occupied for school purposes, would not be exempt, but it is exempt under the charter granted to and accepted by the college before the enactment of said Section 4251. It is settled in Mississippi that the words "and no other" in this and similar exemption statutes have the effect of repealing all repealable exemptions theretofore allowed and not included therein. *Adams v. Y. & M. V. R. R. Co.*, 77 Miss., that part of the opinion so holding being on page 292. The circuit judge held that the exemption granted in the charter of the college had been repealed by said section. The college, however, claimed the exemption was a contract, not subject to repeal, and, therefore, when said section was used to tax the property involved, it impaired the obligation of said contract, and was repugnant to the Federal Constitution.

The Supreme Court affirmed the judgment of the Circuit Court. In its opinion (R. 15) it did not mention this Section 4251, Code of 1906, under which the property was taxed. It placed its opinion entirely on a construction (one which it will later appear was manifestly wrong) of the alleged contract, and held that under the terms of the contract itself the property involved was not covered. However, the Supreme Court, by its decision, gave effect to Section 4251, Code of 1906, passed subsequently to said charter as subjecting said prop-

erty to taxation, and, therefore, did not, by placing its opinion entirely on the construction of the alleged contract, defeat the jurisdiction of this court.

Since the law under which the property was assessed was passed subsequently to the alleged contract, and the opinion of the Supreme Court necessarily gave effect to the said law so subsequently passed, the Supreme Court of the United States will construe the alleged contract independently of the opinion of the lower court, and decide for itself whether the property involved is exempt under the terms thereof, and whether or not Section 4251, Code of 1906, has impaired the obligation of said contract.

THIRD. The statute under which the jurisdiction of this court is invoked in this case is Section 237 of the Judicial Code as amended by Act of September 6, 1916, 39 Statutes at Large 726, 448 Compiled Statute, Section 1214, Federal Statutes Annotated Supplement 1918, page 412; the material part here of said section as amended reading as follows:

"Sec. 237. A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

The validity of Section 4251, Code of 1906, under which section it was agreed the taxes against the property involved were assessed, was drawn in question in the court below on the ground that it was repugnant to the Constitution of the United States, and the necessary effect of the opinion of the lower court was to give validity and effect to the said section.

There can be no judicial impairment of the obligation of a contract. The Constitution, by Section 10, Article I, contemplated a law passed by the Legislature subsequent to the making of the alleged contract. Therefore, this court has no jurisdiction to review the construction placed by a state court on a state law unless by such construction it necessarily gives effect to a law passed subsequently to an alleged contract, which law has been set up by the party claiming the alleged contract as impairing the obligation thereof.

This case, however, comes clearly within the exception mentioned. The college, in its original pleadings, alleged that it had a contract by which the property involved was exempt from taxation. It alleged that the taxes were assessed under Section 4251, Code of 1906, which, it was further alleged, was passed subsequent to the granting of the contract of exemption. By stipulation of counsel it was agreed it was under this Section 4251, Code of 1906, that the said taxes were assessed. The Circuit Court of the state held that this same Section 4251, Code of 1906, repealed the said exemption. The opinion of the Supreme Court, therefore, while not mentioning the said Section 4251, necessarily

gave effect to it in holding said property taxable, and the said section, therefore, necessarily was a law passed by the Legislature which impaired the obligation of the alleged contract.

Under this state of facts, this court will retain jurisdiction and decide for itself what the contract is, and whether or not it has been impaired.

There are a long line of decisions of this court which sustain its jurisdiction in cases where the facts are similar to those of this case.

The case of *Y. & M. V. R. R. Co. v. Thomas*, 132 U. S. 174, 33 Law Ed. 302, was brought up from the same state court, and is identical in its facts, so far as the jurisdictional question is concerned, with the case at bar. The opinion of the state court is reported in 55 Miss. 562. The railroad company claimed an exemption under a charter granted in 1882. The taxes in question were assessed under a general act passed in 1888. In its original bill the railroad company claimed an exemption under its charter, which it alleged to be a contract. It set up this act of 1888, under which the taxes were sought to be assessed, as an impairment of said contract. In deciding the case against the railroad company, and holding that it was not entitled to the exemption claimed, the Supreme Court of Mississippi, in its opinion, paid no attention whatsoever to the Act of 1888 passed subsequently to the charter, and in no way mentioned same, but simply held, as the state court held in the case at bar, that, under a proper construction of the charter itself, the railroad company was not en-

titled to the exemption claimed. An appeal was taken by the railroad company by writ of error to this court, and a motion was made by Thomas, defendant in error, to dismiss the writ of error for lack of jurisdiction. Chief Justice Fuller, speaking for the court, in overruling the motion, said:

“ \* \* \* The taxes in question were assessed under the Act of 1888, and if the charter of the Company, which became a law on the 17th of February, 1882, inhibited such taxation, then this court has jurisdiction to re-examine the conclusion reached. Although by the terms of the Act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the Act; so that if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the Act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the company. The result is the same, although the Act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes; for if the contract existed those laws became inoperative, and would be re-instated by the Act of 1888. The motion to dismiss the writ of error is therefore overruled.”

The case of the *Wilmington & Weldon Railroad Company v. Alshbrook*, 146 U. S. 279, 36 Law Ed. 973, is particularly applicable as upholding the jurisdiction in this case, because in that case, just as in this one, the Supreme Court of the state did not hold against the validity of the contract of exemption from taxation, but

simply held that the property involved was not within the terms of the grant or contract. No reference was made to the subsequent law which had been set up as impairing the obligation of the contract. In overruling the motion to dismiss for lack of jurisdiction this court said:

"The jurisdiction of this court is questioned upon the ground that the decision of the Supreme Court of North Carolina conceded the validity of the contract of exemption contained in the Act of 1834, but denied that particular property was embraced by its terms; and that, therefore, such decision did not involve a Federal question.

"In arriving at its conclusions, however, the state court gave effect to the Revenue Law of 1891 and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed."

In *McCullough v. Commonwealth of Virginia*, 172 U. S. 120, 43 Law Ed. 388, the fourth head note, which fairly presents the holding in the case, says:

"The decision of a state court denying the validity of a state statute which creates a contract, and giving effect to subsequent statutes which impair the obligation of the contract, presents a Federal question which this court may review, although the state court in its opinion considers only the statute which it holds void, and does not discuss the later statutes."

Other cases supporting the jurisdiction are:

*Mobile & Ohio R. R. Co. v. State of Tennessee*,  
153 U. S. 486, 38 Law Ed. 793.

- New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 31 Law Ed. 607.
- Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 Law Ed. 173.
- Yazoo & Mississippi Valley R. R. Co. v. Adams*, 45 Law Ed. 418.
- Northwestern University v. Illinois*, 99 U. S. 309, 25 Law Ed. 387.
- St. Anna's Asylum v. New Orleans*, 105 U. S. 362, 26 Law Ed. 1128.
- Home of Friendless v. Rouse*, 8 Wall. 430, 19 Law Ed. 495.
- Washington University v. Rouse*, 8 Wall. 439, 19 Law Ed. 498.
- Cayoudelet Canal & Navigation Co. v. State of Louisiana*, 233 U. S. 372, 58 Law Ed. 1001.
- Louisiana v. Behrman*, 235 U. S. 168.
- Tidal Oil Co. v. Flannigan*, 263 U. S. 448, 68 Law Ed. 382.

In a case like this, the test of this court's jurisdiction is whether the party claiming the contract has set up in his pleadings a statute passed subsequent thereto, which it alleges impairs the obligation of such contract, and whether the decision of the state court has given effect to the subsequent law. This is very clearly pointed out in the case of *Y. & M. V. R. R. Co. v. Adams*, 180 U. S. 44, 45 Law Ed. 418, this being another case involving a tax exemption, appealed from the Mississippi court. The state court held against the railroad company on a construction of the charter, and this court refused jurisdiction because the railroad company, in its pleadings, had not set up any subsequent law which it claimed impaired the obligation of its charter contract. This case,

and that of *Y. & M. V. R. R. Co. v. Thomas, supra*, clearly set forth the distinctions drawn by this court in the matter of its jurisdiction in such cases. The case at bar falls clearly under the rule announced in the Thomas case, because it set up in its pleadings a subsequent law, to-wit, Section 4251, Code of 1906, under which the assessment was made, and claimed that it impaired the obligation of its contract. And the fact that it did so, if the college has a contract which exempts the property involved, is set at rest by the agreed statement of facts by which it is agreed it was under the said Section 4251, Code of 1906, that the taxes were imposed on the property involved. And the decision of the state court necessarily gave effect to said Section 4251.

In the case of *Carondelet Canal & Navigation Co. v. State of Louisiana*, 233 U. S. 372, 58 Law Ed. 1001, this court held that a decision of the highest state court of Louisiana, that Louisiana Act of 1858, No. 74, on which the canal company based its contract right to compensation upon the reverting of its property to the state, gave the company no such right, is reviewable in the Federal Supreme Court as presenting the question of the impairment of contract obligations, although the state court does not refer to any subsequent legislation, where, by La. Acts 1906, No. 161, a board of control of canal was created which, through the affirmative and repealing provisions of such statute, was to be the instrument and moving agency by which the state was to exercise its asserted right to control and take possession of the canal company's property without making compensation.



So also in the case of *Louisiana v. Behrman*, 235 U. S. 168, 59 Law Ed. 180, this court, in overruling the motion to dismiss the writ of error, said:

“\* \* \* It is equally well settled that, where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guaranty.”

In the recent case of *Tidal Oil Company v. Flanagan*, *supra*, Chief Justice Taft analyzed the various theories of the jurisdiction of this court, and distinguished the various cases, setting forth these theories. In one part of the opinion, he said:

“There is another class of cases relied on to maintain this writ of error. They are those in which this court has held that in determining whether a state law has impaired a contract it must decide for itself whether there was a contract and whether the law as enforced by the state court impairs it. It often happens that a law of the state constitutes part of the contract, and to make the constitutional inhibition effective this court must exercise an independent judgment in deciding as to the validity and construction of the law and the existence and terms of the contract. *Jefferson*

*Branch Bank v. Skelly*, 1 Black 436, 443; 17 Law Ed. 173, 177; *Bridge Proprs. v. Hoboken Land & Improvement Co.*, 1 Wall. 116, 145; 17 Law Ed. 571, 576; *Wright v. Nagle*, 101 U. S. 791, 793; 25 Law Ed. 921, 922; *McGahey v. Virginia*, 135 U. S. 662, 667; 34 Law Ed. 304 "

The fact that Section 4251, Code of 1906, was a general law makes no difference as it has been settled that a general law may impair the obligation of a contract as well as a special law aimed directly at the contract. *Y. & M. V. R. R. Co. v. Thomas*, *supra*; *Bank v. Skelly*, *supra*; *Home of Friendless v. Rouse*, *supra*; *Washington University v. Rouse*, *supra*. In fact, most of the cases cited above sustain this proposition.

There are many other cases supporting the jurisdiction of this court in this case. However, we deem it unnecessary to cite any more of them as we think it manifest that the ones cited sustain jurisdiction.

### STATEMENT OF THE CASE.

This case was tried in the Circuit or lower court of the state, and of course, therefore, in the Supreme Court of the state, on an agreed statement of facts. The suit was begun by Millsaps College, plaintiff in error, by a petition filed with the Council of the City of Jackson, Mississippi, in which it was sought to have the said council vacate an assessment which had been levied against certain property of the college, a part of its endowment fund, described in the petition.

The petition set forth briefly the grounds on which it claimed the right to have the assessment abated, alleging that the property involved was a part of its endowment fund and that by its charter was exempt from taxation. There was filed with the petition as Exhibit "A" thereto a full copy of said charter, and there was also filed with the said petition as Exhibits "B" and "C" thereto copies of two deeds from Major R. W. Millsaps, the founder of the college, showing that he conveyed the property to the college as a part of its endowment fund. This original petition, with the said Exhibits "A," "B" and "C" thereto, are found on pages 1, 2, 3, 4, 5 and 6 of the record in this court.

Section 5 of said charter (top R. 5), which is the exemption section of the said charter, is as follows:

"That the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college, and the buildings, halls

and dormitories thereon erected, and the endowment fund contributed to said college, shall be exempt from all state, county and municipal taxation so long as the said college shall be kept open and be maintained for the purposes contemplated by this act, and no longer."

(The wording of Section 5, as set forth in the record is slightly erroneous. It is quoted correctly above as shown by stipulation of counsel filed herein making certain corrections in the record.)

Note that said section exempts from taxation the endowment fund of said college, and note also the said petition, as filed with the Council of the City of Jackson, contains, among other things, the following:

"\* \* \* that the said buildings constitute a part of the permanent endowment fund of the said college, and the revenues therefrom will always be used to defray the running and operating expenses of the said college."

This petition, by stipulation of counsel, was adopted as the agreed statement of facts upon which the case should be tried, the said stipulation being as follows:

"It is mutually agreed by and between the attorneys representing Millsaps College and the City of Jackson that the matters and things set forth in the petition of Millsaps College, and the amendments and exhibits thereto, are true and correct, and it is agreed for the case to be tried before the judge of the court, a jury being waived, with the facts set forth in the said petition and amendments and exhibits thereto as the agreed statement of facts in this case" (R. 9, 10)

It will, therefore, be seen that the property which the City of Jackson seeks to tax and which the college claims is not subject to taxation, is, by agreement, a part of the endowment fund of said college, which, by Section 5 of the charter, is exempt from taxation.

With this preliminary statement, we will proceed to state the facts at somewhat more length as they appear from the record.

On February 21, 1890, the plaintiff in error, Millsaps College, which is located in the City of Jackson, was granted a charter of incorporation by the Legislature of the State of Mississippi, a copy of said charter being found on record pages 3, 4 and 5. Said charter is found on page 553 Laws of Mississippi of 1890. Under Section 1 of this charter the said corporation, among other rights and powers, was given the right to accept donations of real and personal property for the benefit of said college which of course included endowment. By Section 4 the said corporation was given power to select an appropriate place to establish said college and to purchase grounds, not to exceed one hundred acres, as a building site and campus therefor.

By Section 5 of said charter, as already quoted above, the site and campus, not, however, to exceed one hundred acres for such purpose, "and the endowment fund contributed to said college, shall be exempt from all state, county and municipal taxation so long as the said college shall be kept open and be maintained for the purposes contemplated by this act, and no longer."

The State of Mississippi, by Section 6 of the said charter, exacted an agreement from said corporation to the effect that the cost of education shall be reduced to the lowest point consistent with the efficient operation of said College—"and every reasonable effort shall be made to bring a collegiate education within the reach and ability of the poorer classes of this state."

The said original petition, adopted as the agreed statement of facts in the case, states that organization was had under this charter, and the said charter accepted by the said Millsaps College on June 5th, 1890—"and various and sundry gifts, grants and donations were thereupon and subsequently made to the endowment fund of said college" (R. 1).

The property, the taxation of which is in question in this suit, consists of two lots in the business district of the City of Jackson, on which there are office buildings which are rented out by the college, and the revenues therefrom used to help pay the running and operating expenses of said college (R. 2). These two buildings were donated to the college by Major R. W. Millsaps, its founder and for whom it was named—"In consideration," as the deed recites, "of the and thereby to be given to the endowment of Millsaps College" (R. 5).

The said original petition, which was adopted as the agreed statement of facts, upon which the case was tried, further stated that Millsaps College is a corporation which conducts and operates a college for the education of the youth of the state, and that the said college has, since its organization under its charter, been kept open

and maintained, and is now kept open and maintained for the purposes contemplated in its act of incorporation, as is provided it shall do in Section 5 of its said charter in order to be entitled to the exemption from taxation therein contained, and "the said college has faithfully carried out all of the provisions contained in its said charter." It is further set out in the said petition that the cost to each student is reduced to the lowest point, the tuition to each student being only \$75.00 per year; that all dormitories are operated on a co-operative basis, each student paying only his prorata share of the cost, no profits whatever obtaining to the college; that the income from tuition fees, which is the only income from students, furnishes only a small part of the money necessary for the operation of the college, the balance coming from gifts and the income from the endowment fund, a part of which income is from rentals of said buildings. "Said college," the petition proceeds, "is not operated for profit and no profit is made." "The college gives free tuition to many poor but deserving students; that at the present session (Session of 1923) the college is giving free tuition to eighty-three students; that in addition a revolving loan fund is maintained, which helps about fifteen others."

(These things are material as showing that the college has faithfully complied with Section 6 of its charter, and they will further become material in considering the constitutionality of the exemption in that they show that the college is not operated for profit).

The mayor and commissioners of the City of Jackson denied the petition to vacate the assessment which

had previously been made against the property, and an appeal was prosecuted to the Circuit Court of Hinds County where the case was tried before the circuit judge, with the said original petition of the college, and exhibits thereto, as the agreed statement of facts (R. 9, 10).

The circuit judge sustained the assessment as made by the City of Jackson, and denied the petition to abate said assessment (Judgment, R. 10, 11). In his opinion (R. 10, 11) he stated that the chief question in the case was whether or not the exemption granted in the charter was constitutional under the Constitution of 1869. He further held that if said exemption was constitutional, then it was repealed by Section 4251, Code of 1906.

An appeal was prosecuted from the judgment of the Circuit Court to the Supreme Court. This court sustained the judgment but not the opinion of the lower court. It reached its conclusion from a construction, a manifestly erroneous one, as will be shown, which it placed upon the exemption section of the charter under which it held that the property involved was not embraced within the language of said exemption. (R. 15, 16). For the official report of the opinion see 136 Miss. 862.

The conclusions of the state court will be stated more fully in the argument, which will be preceded by a summary.

After final judgment was entered, the plaintiff in error obtained a writ of error, thereby bringing the case to this court for review (see Record 22, 23, 24 and 25 for the petition and allowance of the Writ of Error).



### POINTS IN THE CASE.

**FIRST.** The Supreme Court of the state, in its opinion, held that the property involved is not embraced within the exemption granted by Section 5 of the charter.

**SECOND.** The circuit judge, in his opinion, held that the exemption given in the charter was unconstitutional and never became effective, being violative of Sections 13 and 20 of Article 12 of the Constitution of 1869. He further held that if he was mistaken in this view, then it was repealed by Section 4251, Code of 1906.

**THIRD.** One of the contentions of counsel for the City of Jackson in the state courts was that the college was not authorized under its charter to hold the property involved, and it was, therefore, not exempt from taxation.

The contention of the college is that each of these theories is erroneous; that the charter exempts the endowment of the college and the property is a part of such endowment; that the exemption granted in the charter is constitutional, and when accepted became an irrevocable contract, not subject to repeal; that by the terms of the charter itself the college is authorized to take and hold the property involved.

Counsel for the city, in the state courts, raised a good many other points which we think are not of sufficient importance to anticipate. We will, therefore, re-

strict our argument to the points mentioned above, and will reserve argument on other points for a reply brief which we will file.

We will, therefore, argue in the order named and undertake to show as follows:

FIRST. That the property involved in this litigation is a part of the endowment fund of Millsaps College, and is exempt from taxation under its charter, which provides that "The endowment fund contributed to said college shall be exempt from all state, county and municipal taxation so long as the said college shall be kept open and maintained for the purposes contemplated by this act, and no longer."

SECOND. (a) That the said exemption is constitutional, not being in violation of any provision of the Constitution of 1869 which was in effect when the said charter was granted and accepted. (b) That the said exemption being given and accepted and constitutional, became a contract inviolable and irrevocable, and, therefore, not subject to repeal by Section 4251, Code of 1906, said Section 4251, Code of 1906, when given such effect, being in violation of Section 10 of Article 1 of the constitution of the United States forbidding a state passing a law impairing the obligation of a contract.

THIRD. That the charter of the college fully authorized it to accept and hold the property, the taxation of which is involved in this litigation.

### ASSIGNMENT OF ERRORS.

The plaintiff in error presented with its petition for a writ of error the following assignment of errors, both of which will be urged here (R. 26) :

"Plaintiff in error, Millsaps College, a corporation chartered and organized under the laws of the State of Mississippi, would show unto the court in this, its assignment of error, that there was manifest error prejudicial to it apparent of record in the proceedings, decision, and final judgment of the Supreme Court of the State of Mississippi in the above entitled matter, in this, to wit :

"First. The said court erred in not holding Section 4251 of the 1906 Code of the Laws of Mississippi void so far as the taxation of Millsaps College property is concerned, because in conflict with Section 10 of Article 1 of the Constitution of the United States forbidding a state to pass a law impairing the obligation of a contract; because in the year 1890 the Legislature of the State of Mississippi granted a charter of incorporation to Millsaps College, plaintiff in error, which said charter was duly accepted by the said college, and thereby became a contract, under which charter the property of the said college against which an assessment for taxes was made by the City of Jackson, defendant in error, was exempted from all state, county and municipal taxation. The defendant in error, the City of Jackson, made the assessment of said taxes under the said Section 4251 of the Code of 1906 which was passed subsequently to said charter. The said section, therefore, when used to make the said property of the said college subject to taxation, impaired the obligation of said contract, and the Su-

preme Court of the State of Mississippi erred in not so holding.

"Second. The Supreme Court of the State of Mississippi erred in holding that the charter of Millsaps College did not by its terms exempt from taxation the property of the college against which an assessment of taxes was made, because the necessary effect of the said decision was to give effect to Section 4251 of the Mississippi Code of 1906, which said section was passed subsequently to said charter, and which said section, when used to subject the said property to taxation, impaired the obligation of the contract between Millsaps College and the State of Mississippi, and was thus unconstitutional and void, being in conflict with Section 10 of Article 1 of the Constitution of the United States.

"Third. For other reasons apparent."

## SUMMARY OF ARGUMENT.

### POINT ONE.

Section five of the charter grants an exemption on two entirely separate and distinct classes of property:

First, the campus and site, not to exceed one hundred acres, and the buildings thereon.

Second, the endowment fund of the college.

It is agreed by stipulation of counsel that the property involved belongs to the latter class, to wit, the endowment fund. It is, therefore exempt.

The language of the charter is plain and unambiguous and there is no room for construction, yet the lower court proceeded to construe same. By a construction which is manifestly wrong, admitting there was room for construction, it held the language employed did not cover the property involved.

It appears, however, beyond all doubt, that the property is a part of the endowment fund, regardless even of the agreement to this effect. The inquiry is whether improved real property is a proper class or kind of property to become a part of the endowment of a college. It is found on examination that the term endowment fund is commonly accepted as applying to and including improved real estate if it is held for the permanent uses of the college and only the revenue is used in its support. Definitions from both law and lay dictionaries, the writings of educators and the decisions of the courts,

all of which are cited in the argument, show the universal acceptance of the fact that the kind of property here involved is a proper class of property to become a part of the endowment fund of a college.

Section five exempted the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college and the endowment fund contributed to said college. The lower court said it seems reasonably clear that the property involved was not included in the endowment fund for the specific grant of an exemption on lands of a certain character negatived by implication an intention to exempt land of a different character.

We show this holding of the court to be fallacious for several reasons: (1) The property involved is a part of the endowment; it is a proper kind of property to be so held; there is no doubt or ambiguity as to what endowment fund means and includes; therefore, there is no room for construction. (2) The purpose of the rule invoked, like all rules of construction, is to aid in discovering the legislative intent when not otherwise clear. The intent here is clear without any rule, but the court uses the rule to create a doubt and then uses the same rule to solve it. (3) It is manifest furthermore, that in this Section five there is no specific grant of an exemption on land *per se*. The exemption is of the campus and site, not, however, to exceed one hundred acres. It is a campus and site which is being specified and enumerated not land as such. The language "that the lands or grounds, not to exceed one hundred acres,

used by the corporation as a site and campus for said college" is no different from saying "The campus and site of said college, not to exceed one hundred acres, and the endowment fund contributed to said college shall be exempt." It is no different from saying "The grounds, not to exceed one hundred acres, used by the corporation as a site and campus, etc." Under neither of these renditions could it be said there is a specification of realty as such. Adding, therefore, *lands*, the only other word actually in the language, certainly cannot be said to be such an enumeration of land, as such, which would bring the rule invoked into play, even if it be admitted, which it is not, that there is any reason for even considering the rule in the connection. (4) Under all the authorities, some of which are cited, the campus and site of a college and the buildings thereon constitute an entirely distinct class of property from the endowment fund. One is the physical plant which is used in the actual operation of the college, the other is the permanent fund which is invested and the income used to pay the operating expense. We submit that an exemption of a given number of acres of land for the physical plant can in no event be taken as an implied exclusion of improved real estate from an exemption of the endowment fund, an entirely different class of property. To effect such a purpose, if there were one, which we deny, in view of the universal recognition that realty may be a part of the endowment, it would have been necessary to except realty from the general exemption given to the endowment. (5) It is quite clear the pur-

pose in mentioning lands or grounds at all was not to exclude anything from the endowment fund but to limit the size of the campus and site to one hundred acres. It is clear from Section four that one hundred acres for a campus was well in mind, for, while there is no clear limitation on the number of acres which could be accepted as a donation for a campus, yet authority was given to purchase, not to exceed one hundred acres for such a purpose. It is not unusual, as shown by instances cited in the argument, for there to be a limitation on the number of acres which can be held exempt for a campus, while full authority to hold realty exempt as a part of the endowment fund is given. It was impossible in this first clause of the exemption section to limit the number of acres which could be held exempt for a campus without mentioning land in some way. Therefore, the most roundabout way, and the one less likely to suggest the construction placed on it by the lower court, was chosen. *Lands or grounds* were not the words to use if there had been any notion by their use to exclude improved realty from the exemption to the endowment. (6) Under the general exemption statute in force at the time this charter was granted, the property involved would have been exempt. Under it the "property, real or personal, belonging to . . . any incorporated institution for the education of youth, used exclusively for the benefit and support of such institution" was exempt. This property is certainly so held. It is inconceivable, in view of what this college by Section 6, was agreeing to do for the state, that it would have



been given a less favorable exemption than was given by general law.

The lower court further says that under the language of Section one only money or negotiable securities can be exempt as a part of the endowment of the college. It would be a strange performance to give an exemption to the endowment in general terms when only money or negotiable securities were meant, for there are several other classes of property which are included in the term. However, the court is clearly in error in saying that section gives authority to accept only money or negotiable securities for endowment purposes. Indeed, an analysis of the language shows such a suggestion is not even plausible.

(1) In this section one authority is given to accept real and personal property for the benefit of the college. This word "benefit" is broad and all inclusive. It is defined as meaning anything which works to the advantages of the recipient. This is really sufficient argument, for the endowment fund certainly is for the "benefit" of the college and this property is a part thereof.

(2) The words which follow with reference to money or negotiable securities of every kind are not words of limitation or restriction on the foregoing powers. Even though "in aid of the endowment" be taken as referring only to money or negotiable securities, a thing which is not true, yet this would not limit the power to accept realty and personalty for the general benefit which includes endowment, for the very words "in aid of" clear-

ly imply that money or negotiable securities are not exclusive. They are to *aid* realty and personalty in making up endowment. (3) The true explanation of the insertion of the words "and contributions of money or negotiable securities of every kind" is that they were put in parenthetically to enlarge upon and make clear the power just given to accept personal property. In Mississippi, money is not commonly regarded as included in the term "personal property," therefore this parenthetic clause, set off by commas, was thrown in to make it clear that "money" and "negotiable securities of every kind" (chooses in action) were included under personal property. (4) Furthermore, in view of the punctuation employed throughout the section, the comma placed just before "in aid of the endowment" shows conclusively that the college was not restricted to money or negotiable securities for endowment purposes. This comma makes "for the benefit" and "in aid of the endowment" parallel clauses of the same meaning and shows conclusively that real property, personal property, money or negotiable securities of every kind, all may be accepted for endowment purposes. The comma makes "in aid of the endowment" refer back to anything preceding which is susceptible of becoming endowment. (5) The evident purpose of the legislature, in view of Section 6, was to create a college that would become large and useful. Therefore, a liberal construction of these powers should be given to effect this manifest purpose.

It is manifest on the face of the charter itself without construction and beyond doubt that the college is en-

titled to the exemption. If the court should think, however, that there is any doubt, we refer it, as an aid in the solution thereof, to: (1) The public policy of the state at the time this charter was given with reference to education and the exemption of the property of incorporated educational institutions from taxation for the purpose of encouraging education. This is traced in the argument showing the utmost liberality in this regard and that the public policy was a most favorable one. (2) The rule of construction in Mississippi in the case of exemptions to educational institutions, following that of most of the states, is liberal, this being an exception to the usual rule of strict construction. (3) The statutes *in pari materia*. It is shown in the argument that under the general exemption statutes in force at the time this charter was given the property involved would have been exempt. Several special charters to educational corporations, one just two days before the Millsaps charter, are mentioned in which exemptions were given under which the property involved would have been exempt.

This charter was given thirty five years ago at a time when exemptions were given much more freely than to-day, and at a time when the state was very much in need of private educational facilities. The lower court has failed to place itself back in those days. It has decided this case through present day lights and ideas.

#### POINT TWO.

The exemption granted in the charter of Millsaps College was constitutional, and, when it was accepted and acted under by the college, became an irrevocable

contract which, under Section Ten of Article One of the Constitution of the United States, cannot be repealed.

The Constitution of 1869 was in force when the charter was given. Before said Constitution was adopted, there was no organic restriction on the legislature in the matter of exemptions from taxation. It was the custom to grant charter exemptions even to corporations for profit and they were upheld as contracts by the courts (*M. & O. R. R. Co. v. Massey*, 52 Miss. 127). There was placed in the Constitution of 1869, Sections 13 and 20 of Article 12; Section 13 providing "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals." And Section 20 providing "Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as provided by law." The circuit judge of the state held that under these two sections the exemption in the Millsaps charter was unconstitutional from its inception and, that if he was mistaken in this, then it had been repealed by Section 4251, Code of 1906.

(1) Section 13 by its very terms applies solely and only to corporations for pecuniary profits. Millsaps College, as shown by stipulation of counsel and also by its charter, is not such a corporation. Said Section 13, therefore, by its very terms leaves the Legislature free to do as it pleases with reference to the taxation of its property. This was specifically held by Chief Justice Samrall in the case of *Mississippi Mills v. Cook*, 56 Miss.

40, decided before the charter was granted. The great error of the circuit judge was in thinking Millsaps College such a corporation as was controlled by Section 13.

(2) Section 20 was construed by the court in the Mississippi Mills case, *supra*, and other cases, as not requiring the taxation of all property, but only requiring that all property which was taxed should be taxed equally, uniformly and *ad valorem*. It was held that neither Sections 13 nor 20 prohibited the legislature from giving to a corporation, even for profit, in its charter a valid exemption from taxation. However, Section 13 rendered any such exemption to a corporation for profit subject to repeal at any time at the will of a subsequent legislature. It was specifically held that Section 20 had no such effect but that there was nothing in it to prohibit the legislature from granting an irrevocable contract of exemption which would be protected from impairment by the Federal Constitution.

(3) The test as to whether the exemption to the college was constitutional in its inception is whether or not it was competent under the Constitution of 1869 for the legislature to grant an exemption from taxation in the charter of a corporation. Of this there is no doubt.

(1) Until the Constitution of 1890 was adopted, it was legal for the legislature to grant special charters and this was the customary way for corporations to be chartered. Such corporations had perpetual succession unless the succession was limited in the charter. (2) At every session of the legislature before the Constitution of 1890 was adopted, many special charters were granted

and in them special exemptions from taxation. The executive department approved these charters and thus the legislative and executive departments determined the constitutionality of the special exemptions. (3) Before the Millsaps charter was granted, several cases involving the constitutionality of such charter exemptions to corporations for pecuniary profits were before the courts and these exemptions, notably in the Mississippi Mills case, *supra*, were recognized as valid. However, under Section 13, such exemptions were uniformly held repealable, but this was solely under Section 13 which has no application to Millsaps College. (4) Every department of the state government, the Legislative, the executive and the judicial, has over a period of fifty five years recognized the constitutionality under the Constitution of 1869 of charter exemptions to educational institutions. This is conclusive as to the validity of this exemption. *Ogden v. Saunders* 12 Wheat. 213, 6 L. E. 608.

The exemption, being constitutional when given, is not subject to repeal. This is true unless there is some provision of the Constitution of 1869 rendering it subject to repeal. There is no such provision. Section 13 was held to render charter exemptions to corporations for profit subject to repeal but Millsaps College is not a corporation for profit. It has never been held nor even insinuated by any court in Mississippi that Section 20 had the effect of rendering subject to repeal an exemption from taxation, not even the circuit judge who thought Section 13 applied in this case. On the other hand, it was specifically held in the Mississippi Mills

case, *supra*, that Section 20 had no such effect. It was also said by Chief Justice Simrall in said case that the convention excluded educational and religious corporations and left them just as they were before the convention. There is no doubt as to how they were before the convention for up to that time the legislature could grant perpetual contracts of exemptions to corporations even for profit. There were no restrictions. It was solely and only by virtue of Section 13 that any exemption from taxation in Mississippi was ever held subject to repeal. Said section cannot apply to Millsaps College. Therefore, there was no provision in the Constitution of 1869 which gave a subsequent legislature the power to repeal the charter exemption to this college.

It is settled by a long line of decisions of the Supreme Court of the United States that an exemption from taxation given in a charter which is accepted and acted on, cannot be repealed by a subsequent legislature without conflicting with the contract clause of the Federal Constitution, unless there is a provision in the organic law of the state rendering same subject to repeal.

*Home of Friendless v. Rouse*, 75 U. S. 430, 19 Law Ed. 495.

*Washington University v. Rouse*, 75 U. S. 439, 19 Law Ed. 498.

*St. Anna's Asylum v. City of New Orleans*, 105 U. S. 362, 26 Law Ed. 1128.

*Northwestern University v. People*, 99 U. S. 309, 25 Law Ed. 387.

These cases further hold that the consideration is presumed. But this is not necessary in this case in view of Section 6 of the charter.

## POINT THREE.

Counsel for the city argued below that the charter does not authorize the college to accept the property involved. This position is clearly untenable for Section One of the charter specifically gives the right to accept donations of real property for its benefit. This property is certainly for its benefit. Counsel contended because Section 4 gave authority to purchase not to exceed one hundred acres for a campus, that, therefore, the college could not hold but one hundred acres for any purpose. However, there is a clear distinction between land for a campus and land for the general benefit of the college, as endowment. The most that can be said of the language in Section 4 is that it carves an exception out of the general power given in Section 1 to the extent of the amount of land which the college could have for a campus, leaving the college in possession of full power to accept realty for all other purposes. "Where the enacting clause is general in its language and object, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause, which does not fall fairly within its terms." *United States v. Dickson*, 15 Peters, 141, 10 Law Ed. 689.

In order to present fairly the various points involved a rather lengthy brief was necessary. We made an earnest effort to shorten it. While the discussions may be full, we think they all bear directly on the points



## ARGUMENT.

### POINT ONE.

**The property involved is a part of the endowment fund of Millsaps College and is exempt from taxation under Section Five of its Charter.**

Section 5 of the charter of Millsaps College grants an exemption on two classes of property:

First, the campus and site of the college not to exceed, however, one hundred acres, and the buildings thereon.

Second, the endowment fund of the college.

The property involved in this litigation belongs to the second class above mentioned, to-wit, the endowment fund, and it is, therefore, exempt from taxation. The fact that it is a part of the endowment fund of the college and is covered by the charter is entirely set at rest by the stipulation of counsel (R. 1, 2).

This would seem to settle the question in favor of the college, provided the said exemption is constitutional and not subject to repeal, and provided further the college is authorized by its charter to hold the property involved. Indeed, in the Circuit Court of the state whether or not the language of the exemption covered the property involved was hardly considered an open question. The questions there urged by counsel for the city were the constitutional question and whether or not

the college was authorized to hold the property. Witness the opinion of the circuit judge (R. 10) in which he said the chief question in the case was whether or not the exemption granted was constitutional. Constitutional questions are not reached in Mississippi until all others are passed.

However, the Supreme Court held that the property is not covered by the language of the charter. We think the conclusion was reached by a construction which is strained and fanciful and manifestly wrong. We think the question settled by the stipulation of counsel under which it is agreed that the property is a part of the endowment fund of the college. Yet, in view of the holding of the Supreme Court, it becomes necessary to discuss the subject.

It seems to us the only pertinent inquiry is as to whether the property involved is a proper class of property to become a part of the endowment of a college. In other words, does endowment include improved real estate? Of this we submit there can be no question if it is held as such, and it is agreed that this property is so held.

What is an endowment fund? Mr. Trevor Arnett, formerly a member of the General Education Board of New York, and a recognized authority on college finance, on page 24 of his book on "College and University Finance," defines "endowment" as follows:

"College endowment is a fund, the principal of which is invested and kept inviolate and only the income used for the general support of the college,

or for some specific object in connection with it. The Fund thus established is sacred and should not be touched or encroached upon for any object whatsoever; its income alone is available."

The word "endowment" and the words "endowment fund" mean the same thing and are used interchangeably and synonymously both in the law books and in common usage and professionally. Mr. Arnett so uses them throughout his book, and so do the cases which will be hereafter cited which discuss any questions relating to the permanent fund of a college or institution.

As to what can become a part of such endowment fund, Mr. Arnett, on page 29 of his book, said:

"Gifts for endowment may be made in cash, securities, or any property possessing value."

And on page 30 he says:

"Real estate is often given for endowment."

Bouvier's Law Dictionary defines "endowment" as follows:

"Now generally used of a permanent provision for any public object, as a school or hospital; by the endowment of such institution is commonly understood, not the building or provisions of sites for them, but the providing for a fixed revenue for their support."

Webster's New International Dictionary defines the word as follows:

"1st. Act of endowing, or bestowing a dower, fund or permanent provision for support. 2nd. That which is bestowed or settled on a person or an

institution; property, fund, or revenue permanently appropriated to any object; as the endowment of a college."

The Century Dictionary, Volume 2, defines the word as follows:

"1st. The act of settling dower on a woman. 2nd. The act of settling a fund or permanent provision for the support of any person or object as a student, a professorship, a school, a hospital. 3rd. That which is bestowed or settled; property, fund or revenue permanently appropriated to any object as the endowment of a church, hospital or college."

The same dictionary defines the word "fund," a noun (it being defined as both a noun and transitive verb), as follows:

"(Latin *fundus* meaning bottom, also in particular a piece of land, a farm, estate). 2nd. A stock or accumulation of money, or other forms of wealth devoted to or available for some purpose as the carrying on of some business or enterprise, or for the support and maintenance of an institution, a family or a person, as a sinking fund. • • • A fund may be either active or passive. It is active when the bulk of it is invested in a subject of the business or enterprise as merchandise, ships, factories, *land*, bank, loans, etc.; passive when it is invested in such a way (as in *real estate* or stocks) as to produce a fixed or nearly uniform income which alone is used for a specific purpose."

Black's Law Dictionary, Second Edition, defines the word "endowment" as follows:

"The act of settling a fund or permanent pecuniary provision for the maintenance of a public institution, charity, college, etc."

So much for the definitions. Coming now to a few cases which have had occasion to discuss "endowment" we find in the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 Law Ed. 629, that Justice Story referred to the permanent property of the college, which was made up in part by land, sometimes as "endowment" and sometimes as "corporate funds."

In the case of *Trustees for Vincennes University v. State of Indiana*, 14 Howard, 268, 14 Law Ed. 416, this court used the word "fund" to include lands:

"\* \* \* It (the donation) was reserved and designated out of the public lands before they were offered for sale, and consequently so munificent an endowment for a literary institution must have increased the value of the public lands in that part of the state" \* \* \* "but, by selling the lands, they have diverted the fund, for the preservation and management of which, the corporation was instituted."

In the case of *State v. V. & N. R. R. Co.*, 51 Miss. 361, the Mississippi Supreme Court said:

"\* \* \* Take Iowa as an illustration of one class. She has a school *fund* in *land* and money valued at not much less than five million dollars" (Italics ours).

In the case of *Brown University v. Granger*, a Rhode Island case, reported in 36 L. R. A. 847, the Supreme Court of Rhode Island said:

"\* \* \* The main question raised by the pleadings in this case is whether a certain parcel of real estate situated on Westminister Street, in the City of Providence, which the plaintiff owned,

and held for its corporate purposes, is liable to taxation. Said real estate constitutes a part of the endowment of the plaintiff college. • • • But it is argued by the city solicitor that the phrase 'the college estate' in the charter ought to be given its most limited meaning and held to include only the college estate proper, that is, the college buildings and grounds and not the endowment of the college which might comprise both real and personal property."

In the case of *Webster City v. Wright County*, an Iowa case reported in 123 N. W. 193, 24 L. R. A. (N. S.) 1205, the Supreme Court of Iowa said:

"• • • Land which is a part of the endowment of a free public library is within a statute exempting from taxation real estate owned by an educational institution within the state as part of its *endowment fund*, (Italics ours) although it is not located in the same county with the library."

The property was 640 acres of land which was rented out and the revenues used for the support of the library.

In *Ellsworth College v. Emmett County*, an Iowa case reported in 135 N. W. 594, 42 L. R. A. (N. S.) 530, it is said:

"• • • Real estate given to trustees in trust to sell and pay the proceeds to a college as an endowment fund is exempt from taxation in the hands of the trustees under a statute providing that real estate owned by an educational institution as part of its *endowment fund* shall not be taxed."

In the case of *Edward Abend v. Endowment Fund Commissioners*, 174 Ill. 96, it is recognized that real

estate may be a part of the permanent endowment fund of a college, and in this case, as in the preceding ones, the words "endowment" and "endowment fund" are used synonymously and interchangeably and to include all kind of property, including real property.

In the case of *McElwain Richards Company v. Gifford*, 65 N. E. Rep. (Ind.) 576, the Supreme Court of Indiana referred to the endowment of the University of Indiana as "the permanent endowment fund," which included real estate.

In the case of *Yale University v. Town of New Haven*, 71 Conn. 316, 43 L. R. A. 497, the Supreme Court recognized that real estate constituted a part of the funds of the university. See the syllabi.

The purpose of the foregoing definitions and citations is to show the universal acceptance of the meaning of the term "endowment fund," and what property is included therein. They show that the law dictionaries, the lay dictionaries, the educational profession, and the courts, all recognize that real estate is one of the classes of property which goes to make up the permanent or endowment fund of a college. This fact, added to the stipulation by which it is agreed that "The said two buildings are rented out and all and every part of the revenue derived from said buildings is used to defray the operating expenses of said college" settles the question beyond doubt, even without the further stipulation that the property is actually a part of the endowment. In the use of language, Legislatures are presumed to mean what the words commonly imply.

We submit the language of this exemption is so clear there is no room for construction. The charter exempts the endowment fund and the property is a part thereof. It is only when the meaning of language is doubtful that it needs construction, and this means substantial doubt, not more or less plausible suggestions made by one seeking to cast doubt on something the meaning of which is clear. These are maxims that need no citation of authority.

Notwithstanding the language of this exemption section is perfectly clear, the state court proceeded to construe same, saying:

"The endowment of a college is commonly understood as including all property real or personal, given to it for its permanent support. If the term is to be so defined here, then practically all of the land which the corporation can hold 'for the benefit of the college' will be exempt for all of such property must necessarily be one of two classes; First, the campus and grounds on which the college buildings are situated, or second, land the revenue from which is applied to the support of the college; or in other words, land held as a part of its endowment.

"It seems reasonably clear that the term 'endowment fund' is here used in a more restricted sense and was not intended to include land, for the specific grant of an exemption on land of a certain character negatives by implication an intention to exempt land of a different character. *State v. Krollman*, 38 N. J. Law 574. *Expressio Unius Est Exclusio Alterius*."

The lower court reached its conclusion by invoking the rule *expressio unius est exclusio alterius*.



We submit that under the language of this exemption section said rule of construction has no application whatsoever. It is not a substantive law, but is only one of the many rules that have grown up to aid in the solution of doubtful statutes, not to be used to create a doubt in language that is otherwise clear. No rule of construction was ever formulated to create ambiguities in statutes, but only to help solve such ambiguities that arise on the face of the statutes themselves. It clearly appears from the opinion that the lower court used the rule to create the doubt, and then used it to solve the doubt thus created—against the college. It says "It seems reasonably clear that the term 'endowment fund' is here used in a more restricted sense." But why does the court say it so appears? Because "for the specific grant of an exemption on land of a certain character negatives by implication an intention to exempt land of a different character," thus assigning the rule as the reason for the doubt. But this is not the purpose of rules of construction.

The rule of construction invoked by the lower court is no different from the rest. Says Lewis' Sutherland Statutory Construction, Volume 2, page 916, Section 491, discussing this rule:

"This maxim, like all rules of construction, is applicable under certain conditions to determine the intention of the law maker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusions; but otherwise the expression of one or more things is not a negation or exclusion of other things."

This court discussed this rule in *United States v. Barnes*, 222 U. S. 518, 56 Law Ed. 293, in which it said:

“• • • The maxim invoked expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest.”

The rule has no application to this case, because there is no doubt as to what is meant by endowment fund and what is included therein. However, admitting for the sake of the argument, that there is sufficient reason to consider whether the rule can have any effect on this exemption, we submit such a consideration will show it to have none.

In the first place there is no enumeration of land or real estate as such which could bring the rule into play. The specific grant of an exemption in the first clause of the charter is of the campus and site, not of land *per se*. The exemption is of two entirely separate and distinct classes of property, first, the campus and grounds on which the college buildings, dormitories, etc., are located; second, the endowment. It cannot be disputed that lands or grounds for a campus and site is an entirely different class of property from improved real estate held as part of the endowment fund. This proposition is well settled by authority.

Bouvier's Law Dictionary defines “endowment” as follows:

“Now generally used as a permanent provision for any public object, as a school or hospital; by the endowment of such institution is commonly under-

stood, *not the buildings or provisions of sites for them*, (Italics ours) but the providing for a fixed revenue for their support."

*Edwards v. Hall*, 6 De Gex M. & G. Report, 74 to

94, in one place says:

"By the endowment of a school, or hospital, or chapel, it is commonly understood not the building or purchasing a site for a school, or hospital, or chapel, but the providing of a fixed revenue for the support of those institutions."

Mr. Arnett, on page 43 of his book, above referred to, says:

"• • • Campus, laboratories, libraries, recitation buildings are not endowments, and funds so invested simply cease to be endowment, for they produce no money income."

In fact, this author treats the subject of "Endowment," including the permanent funds of the college, under a separate chapter entirely from what he calls the "physical plant," which he defines to be the land composing the campus and site on which is built the laboratories, libraries, recitation buildings, etc.

With the distinction clearly in mind that land for a campus and site is an entirely different class of property from land as a part of the endowment fund, let us note the exact language of the exemption:

"That the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college, and the buildings, halls and dormitories thereon erected, and the endowment fund contributed to said college, shall be ex-

empt from all state, county and municipal taxation, so long as the said college shall be kept open and be maintained for the purposes contemplated by this act, and no longer."

It appears to us beyond all doubt that there is nothing in this language which can reasonably be said to exclude improved real estate as a part of the endowment of this institution which is to be exempt, and we submit with deference that a construction to this effect is manifestly wrong. There is no such enumeration of land *per se* that would make the rule invoked applicable. It is the campus and site which is being exempted; it is a campus and site that is being specifically mentioned and enumerated. A casual analysis shows this to be the case.

The language used is no different from simply saying, "The campus and site, not to exceed one hundred acres in extent, and the endowment fund contributed to said college, shall be exempt." We still have in this language the limitation on the number of acres which could be held exempt for a campus and site. (We will later show that the only purpose of mentioning land at all instead of simply saying "campus and site" was to make this very limitation in the number of acres for a campus and site.) Certainly if just the words "campus and site" had been used it could not be said that there was mention of land as such so as to exclude land in the language following.

The language used is no different from saying, "That the grounds, not to exceed one hundred acres,

used as a campus and site, and the endowment fund contributed to said college, shall be exempt." This certainly would not be such an enumeration of realty as to bring the rule invoked into play.

Adding, therefore, the only other word actually in the language—"That the lands or grounds, not to exceed one hundred acres, used as a campus and site, and the endowment fund contributed"—certainly cannot be said to be such an enumeration of real property as such as would make the rule applicable.

The language, as used, excludes an exemption on more land than one hundred acres for a campus and site, but does not exclude realty composing an entirely different class of property, to wit, the endowment. "Lands or grounds" were not natural or proper words to use here if there was an intention to exclude improved real property as a part of the endowment.

In the second place, it is quite manifest that the only reason whatever for mentioning either lands or grounds or one hundred acres, in this first clause of the exemption, was to limit the size of the campus that could be held as exempt. Indeed, in the preceding section the charter provided:

"\* \* \* The said corporation shall have the power \* \* \* to purchase *grounds*, not to exceed one hundred acres, as a building site and campus therefor \* \* \* and may accept donations or grants of land for the site of said institution."

While it is not clear that the corporation could not accept as a donation more than one hundred acres for a

campus, yet the limitation on the authority to purchase more than one hundred acres for the purpose shows that only one hundred acres of land for a campus was well in mind, thus explaining the limitation for such purpose which could be held as exempt. There is nothing strange about limiting the exemption to one hundred acres for a campus, and in exempting improved real property as a part of the endowment fund. One hundred acres is enough for the campus of any institution. In view of the liberal provisions with reference to exemptions and otherwise which the state was making for the college, and in view of what the state, from Section 6, expected to obtain from the college, it had an interest in not permitting this corporation to invest its money in idle lands. In addition, it was known at the time of this charter that this college was to be located in the northern part of the City of Jackson. If it were permitted to hold exempt from taxation more than one hundred acres of land it could easily hamper the growth northward of the City of Jackson, as indeed it has already partially done, even with one hundred acres. It is not an unusual thing for an institution of this kind to be limited in the number of acres that it can hold exempt as a campus and site, and yet hold exempt revenue producing real property as a part of its endowment fund. For instance, the case of *Webster City v. Wright County*, an Iowa case, reported in 123 N. W. 193, 24 L. R. A. (N. S.) 1205, which case was decided in 1905, shows that under the laws of Iowa an institution of this kind might hold exempt not exceeding 160 acres of land for a campus, but at the same time

could hold an unlimited amount of real property as a part of its endowment fund and have it exempt from taxation—in this case 640 acres.

The case of *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776, shows that the charter of St. Clara's Female Academy limited the land that it could hold as a campus and site exempt from taxation to 40 acres, whereas it was permitted under its charter to hold exempt from taxation improved real estate to the value of \$500,000.00. This is shown on page 782 of 56 American Reports.

Having the purpose and desire to limit the number of acres of land which this college could hold exempt from taxation as a campus and site, it was absolutely necessary to mention land in some way, shape or form, to effect this purpose. We submit that the Legislature chose the most round about way possible to do this, and the one less likely to suggest the construction placed on it by the lower court. "Lands or grounds, not to exceed one hundred acres, used as a campus and site." If the Legislature had any such idea as ascribed to it by the lower court it could certainly have found a better way to express it. And if it had any notion of excluding improved real property as a part of the endowment fund which followed, in view of the universal meaning of the term, and what is included therein, it was absolutely necessary for them to make such intention clear. As the language appears, we submit it does not reasonably suggest such an intention.

Lewis' Sutherland Statutory Construction, Vol. 2, Section Edition, page 924, Section 495, still discussing the rule invoked by the lower court, says if there is some special reason for mentioning one, and none for mentioning a second, which is otherwise within the statute, the rule will not apply. Having seen, therefore, that the purpose of the Legislature in mentioning one hundred acres of land was only to limit the number of acres for a campus, to be held as exempt, the rule cannot apply to exclude improved real property as a part of the endowment, an entirely different class of property. The rule could only be applied to exclude an exemption on more than one hundred acres for a campus, and this would be unnecessary for such intention is manifest without construction.

But, the lower court says, immediately following the language quoted above from its opinion:

"• • • Moreover, if it was not the intention of the Legislature to restrict the exemption on land to that specifically described in the grant of the exemption, but to include also therein land which the college might hold as a part of its endowment, such intention could have been easily placed beyond doubt by a simple provision that all land of the college which it is authorized by its charter to own shall be exempt from all state, county and municipal taxation."

We submit with deference, however, that such intention was placed beyond doubt when the Legislature exempted the endowment fund which includes real property held for its permanent support as distinguished from its site and campus. Moreover, such a provision



as the lower court suggests would not have affected the evident intention of the Legislature, because under such a provision there would be no limitation on the number of acres which could be held exempt as a campus. And, which is more important, such a provision would not exempt the personal property included in the endowment fund. Indeed, "endowment fund" is the broadest possible term that could have been employed, because, as seen from the definitions, it includes every class of property which is susceptible of being held by the college for its permanent support from which revenues can be obtained for the support of the college. The use of this broad and all inclusive term eliminated entirely all doubts which might have arisen if the exemption had been of "the college estate" or other terms on which limitations might have been made.

In the next place, under the general exemptions granted by the general statute in force at the time this charter was granted, to incorporated institutions for the education of youth, the property involved in this case was exempt from taxation. At the time this charter was granted, Section 468 of the Code of 1880 was in force, and it provided for exemptions from taxation as follows:

• • • Property, real or personal, belonging to the United States, or to this state, or to any county or incorporated city or town within the same, or to any religious society or *incorporated institution for the education of youth*, used exclusively for the *benefit and support* of such society or institution • • • (italics ours).

It is seen from the above statute that property belonging to an incorporated institution for the education of youth, used exclusively for the benefit and support of same, was exempt from taxation by general law at the time this charter was granted. Certainly the property involved in this case is used exclusively both for the benefit and support of Millsaps College, and would, therefore, have been exempt under this general statute in force at the time the charter was given.

Is it conceivable, in view of all this college in its charter was agreeing to do for the state, that the state would have accorded to it less favorable consideration in the matter of exemption from taxation than it accorded by general law then in force to all incorporated educational institutions? We submit the spirit of this charter is extremely liberal. There are no words of restriction or limitation therein except as to the number of acres to be held for a campus, and we submit that there is nothing to indicate such an intention.

The opinion of the lower court further says:

"The endowment of the college is referred to in one other section of the charter and its meaning there is evidently the one intended here for the rule is that 'where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and where its meaning in one instance is clear this meaning will be attached to it elsewhere unless it clearly appears from the whole statute that it was the intention of the legislature to use it in different senses.' 36 Cyc. 1132, 25 R. C. L. 994; *Green v. Weller*, 32 Miss. 650. Section V of the charter exempts from tax-

tion the 'endowment fund contributed to said college.' Section 1 of the charter authorizes the corporation to 'accept . . . contributions of money or negotiable securities of every kind, in aid of the endowment of such college.' The 'endowment fund' which Section 1 of the charter contemplates will be 'contributed to said college' is composed of money and negotiable securities from which applying the rule just hereinbefore set out, it follows that property of such character only is included in the exemption of 'the endowment fund contributed to said college.' "

We have been unable to decide just what the lower court meant by this part of its opinion. Boiled down it would seem to be its idea that while the college could accept the property involved for its general benefit yet it could not accept it for endowment purposes but could only accept money or negotiable securities for such purpose. This, however, would be in direct conflict with the stipulation of counsel by which it is agreed that the property is a part of the endowment fund, and furthermore could not be reconciled with the preceding portions of the opinion in which the court recognizes that it is a part of the endowment. In the fifth paragraph of its opinion it is said: "Consequently the narrow question for decision is, Does the exemption include land held by the college as a part of its endowment?" And in paragraph two it is said: "The property consists of a lot on which the donor had erected a building which is rented by the college to various tenants for business purposes and is held by the college, according to the agreement of counsel, as a part of its endowment."

On the other hand it could be said the court had the idea because the word "contributions" was used with reference to money or negotiable securities in Section One and the word "contributed" was used in Section Five in exempting the endowment fund, that, therefore, only that part of the endowment fund made up of money or negotiable securities was exempt. However, we would not want to credit the court with paying any attention to such an insignificant incident unless this was manifestly its idea. The use of the word "contributions" in Section One could be explained on the grounds of euphony alone. The term "donations" had just been used and when the author of the charter came to throw in this parenthetical clause, naturally he did not wish to repeat the word "donations," and therefore chose a synonym. The word "contribute" in Section Five, in "And the endowment fund contributed to said college" is the broadest possible word which could have been used and is the only word which, in its ordinary and common acceptation, would include both realty and personality. If the word "given" had been used, it could have been said usually to designate personality. If the word "grant" had been used, it could have been said usually to designate realty. The word "contribute," however, designates both realty and personality. The Century Dictionary, Volume 2, defines "contribute" as follows:

"To give or grant in common with others; give to a common stock or for a common purpose; furnish as a share or constituent part of anything."

The word, therefore, is the broadest which could have been used and includes both the personalty given and the realty granted, and the language is just the same as saying: "And the endowment fund given or granted to said college shall be exempt."

Regardless of what the lower court meant by this last part of its opinion, it is quite apparent that there is nothing in the charter which prohibits this college from accepting and holding the property involved as a part of its endowment, but on the contrary there is specific authority to do this very thing. Note the language and also the punctuation employed:

"• • •, and by that name they and their successors may sue and be sued, plead and be impleaded, contract and be contracted with, and have a common seal and break the same at pleasure, and may accept donations of real and personal property for the benefit of the college hereafter to be established by them, and contributions of money or negotiable securities of every kind, in aid of the endowment of such college, and may confer degrees and give certificates of scholarship, • • •."

"Benefit" is a broad word. It is defined by Bouvier's Law Dictionary as "profit, gain, advantage." It was held in the case of *Winthrop County v. Clinton*, 196 Pa. 472, to be anything which works to the advantage or gain of the recipient. Therefore, when authority was given the college to accept real property for its benefit, this was authority to accept for all purposes just so it was advantageous. It includes the endowment fund. It includes the property involved.

The language is awkward but there is nothing in it to indicate that only money or negotiable securities of every kind could be accepted for endowment purposes. The lower court regarded the words "in aid of the endowment of such college" as referring only to money or negotiable securities. This is not a correct view as we will later demonstrate, but it could be admitted to be correct and it would still not follow that only money or negotiable securities could be accepted for endowment. This is true because the words following the words giving the authority to accept donations for the benefit of the college cannot, in any event, be taken as a limitation on the authority to accept for the benefit, etc.; and it has been seen that benefit includes endowment. There is here no proviso, no exception and no words of exclusion. On the contrary, as will be shown, "and contributions of money or negotiable securities of every kind" are words of enlargement and, more or less of explanation. Then, too, "in aid of the endowment" clearly implies that money or negotiable securities are to aid (meaning to assist, help, enlarge) that part of the real and personal property given to the college for its benefit which should be set apart for endowment. The limitation, if any, is found in the purpose for which money or negotiable securities can be accepted and not the purpose for which real and personal property can be accepted, for these can be accepted for the "benefit" of the college which includes endowment.

One satisfactory explanation of the language, if it needs one, is that the words "and contributions of money

or negotiable securities of every kind" were thrown in parenthetically, so to speak, to make absolutely plain what is included under the term "personal property" just preceding or rather to make it plain that money and choses in action were included under the term "personal property." Money is not always regarded in common acceptance as personal property, and is not usually included in the term "personal property." Indeed, under the exemption statute in Mississippi, giving \$250.00 of personal property exempt from execution our courts have held that money is not included therein. These words "money or negotiable securities of every kind" were, therefore, parenthetically thrown in for purposes of enlargement and not restriction. Indeed, from the very reading of the words it is seen that there is somewhat of an emphasis on the word "every" in "negotiable securities of every kind." Further note the use of the word "or" in "money or negotiable securities." Literally construed, this would mean if money was accepted, then negotiable securities could not be accepted, because if I say that I will give \$100.00 in money or my note for \$100.00, I do not mean that I will give both. This simply shows the looseness of the language employed and that the author thereof was not particularly precise.

Another way to look at this language is that "for the benefit of the college" and "in aid of the endowment of such college" are parallel clauses of the same meaning, under which power was given to accept real and personal property for the benefit of the college, and

in aid of its endowment. This strengthens the view that "and contributions of money or negotiable securities of every kind" was merely thrown in parenthetically as explained above.

The comma which immediately precedes "in aid of the endowment of such college" makes it manifest there was no intention that the words should refer to and modify only "money and negotiable securities." If there had been any intention that "in aid of the endowment" should only refer to and modify money or securities, this comma would never have been placed here. Under every rule of punctuation, the fact it was placed where it is makes "in aid of the endowment" modify and relate back to everything which precedes which is susceptible of becoming a part of the endowment, that is, real property, personal property, money and negotiable securities.

Regardless, however, of just why the authority is couched in the language in which we find it, it is certain there was no intention that only money or negotiable securities could be accepted for endowment purposes. Under such a construction, we would have the anomalous situation that this college could take and hold this property for its benefit (profit, gain, fruit, advantage), and yet not have it as a part of its endowment. It would be endowment and yet it would not be endowment. This would be a contradiction in terms which is inconceivable. Courts will not construe statutes so as to lead to absurd results. *Hawson v. Maskeche*, 190 U. S. 197. This case also holds statutes must receive a construction which will effectuate the legislative intention.



It is inconceivable, in view of what by Section six was expected of this college, that it would have been thus restricted.

That authority was given to accept the property involved as a part of the endowment fund of the college is the practical construction which has been placed thereon from the very inception of the college. Note the petition (R 1) which is the agreed statement of facts: "That organization was had under said charter and said charter accepted by Millsaps College on June 5th, 1890, and various and sundry gifts, *grants* and *donations* were thereupon and subsequently made to the endowment fund of said college." Note again the very deed by which Major Millsaps donated the property, recited. "In consideration of the and thereby to be given to the endowment of Millsaps College." Major Millsaps was the founder of the college, it was named for him, he was one of the incorporators, he was a good lawyer as well as a great business man, he probably knew more about this charter than any other one man. This is the construction he put upon this charter. It is evident also Major Millsaps thought the property would be exempt from taxation; otherwise, he would have given some other kind of property which he could have done as easily as not.

The fact that the state has acquiesced in the acceptance and holding by the college since 1890 of such grants and donations for the endowment fund of the college shows this is the construction that has been put on the charter by the state for these many years. This prac-

tical construction so placed by all parties for thirty-five years is determinative of the question, if there ever was any doubt, which we deny.

*Prigg v. Pennsylvania*, 16 Peters, 539, 10 Law Ed. 1060.

It is evident from this charter and also from the public policy of the state hereafter mentioned that the purpose of the state in creating this corporation was that a large and prosperous college should be built up so it could the better carry out its agreement in Section 6 of the charter that the cost of education would be reduced to the lowest point and every reasonable effort would be made to bring a collegiate education within the reach and ability of the poorer classes. Therefore, a liberal construction should be given to the power to accept permanent support property in order to effectuate the manifest purpose of the legislature (it will be later shown that the rule of strict construction does not even apply to the exemption section of this charter).

The lower court, therefore, is manifestly wrong when it says the exemption is only to the campus and to money or negotiable securities. It would have been utterly foolish for the legislature to have exempted the *endowment fund* (all inclusive), if it meant that only money or negotiable securities should be exempt. What is meant can only be determined from what it says, and it says "endowment fund" which includes the property here involved, and also other classes of property than money or negotiable securities.

We submit, from the foregoing considerations, there can be no doubt on the face of the charter itself that the property here involved, being a part of the endowment fund contributed to said college, is exempt. If however, this court considers there is any doubt that the college is entitled to the exemption on the face of the charter itself, then we present as an aid in the solution of such doubt:

1st. The public policy of the State of Mississippi at the time this charter was given with reference to education, and the exemption of property used for educational purposes.

2nd. The rule of construction of exemptions to educational institutions.

3rd. The statutes *in pari materia*.

1st. The ordinance of July 13th, 1787 for the government of the northwestern territory was extended, by Act of Congress of date May 20th, 1790, to the Mississippi territory, and this ordinance was the basis of our civilization (Digest of the Statutes of Mississippi Territory, 1816, page 29, Article 3, page 33). This Ordinance of 1787 foreshadowed the policy of this state in reference to education in these words:

"Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

It is a historical fact that the very first act passed by the Mississippi Legislature when it became a state was an act incorporating a school.

That this continued to be the public policy of the state, at least for a long time after the charter to Mills College was granted, is evidenced by the utterance of the Supreme Court of Mississippi in the case of *City of Jackson v. Preston*, 93 Miss. 366. This case involved the question as to whether or not a college operated by a private individual for profit to himself was exempt from taxation under the general statute of the state. The court, after stating that the exemption law must be interpreted in the light of the well known public policy of the state, said:

"When we look at the public policy of the state, we know that it is a matter of history that its cherished ambition has been that every youth within its borders shall be provided with proper and sufficient educational facilities. This we gather, not only from the organic law of the state, but from the enactments of the legislature, and from the public utterances of our great men. The state was the first to realize its own inability to provide the educational advantages which were even reasonably necessary, and that the advantages offered by it must be supplemented by the efforts of private educational institutions. It, therefore, became a part of the public policy of this state to encourage private educational institutions by exempting 'incorporated institutions' from taxation. The fact that, under the previous statutes, the exemption was confined to incorporated institutions, was not in our judgment, evidence of any disposition on the part of the legislature to discriminate against individuals, but more likely grew out of the fact that private education was, for the most part, furnished by incorporated educational institutions created for that purpose. This policy was pursued for many years, until it was evidently made apparent to the legis-

lature, not only that this useful work was being carried on by private individuals, to whom should be extended the advantages afforded by exemption from taxation, but it was evidently thought and considered by the legislature that the interests of education were better promoted and advanced by encouraging individual effort for profit."

2nd. As a general rule exemption statutes must be strictly construed. However, the Supreme Court of Mississippi, following the courts of many other states, has made an exception in the case of exemptions to religious and educational institutions.

In the case of *Adams County v. Catholic Diocese of Natchez*, 110 Miss. 896, the Supreme Court of Mississippi, said:

"\* \* \* We concede that statutes exempting persons and property from taxation must be strictly construed, but it is also true that there is a relaxation of the rule in the case of statutes of exemption applicable to religious and educational institutions, and that the supreme test is in the intent of the legislature. In *State v. Fisk University*, 87 Tenn. 241, 10 S. W. 286, the court holds:

"The intention of the legislature must govern in ascertaining the extent of tax exemptions, and when the exemption is to religious, scientific, literary, and educational institutions, the same strict construction will not be indulged in that would be applied to corporations created for private gain or profit."

"In *Halla Springs v. Marshall County*, 104 Miss. 761, 61 So. 703, Justice Reed said:

"In construing statutes, we must look to the intention of the legislature, the spirit of the law, and the policy and purpose of the same." "

We suppose that this court will apply the rule of construction as established by the court from which the case is appealed. However, this is the general rule as applied to the construction of exemptions to educational institutions. For example, see *Yale University v. Town of New Haven*, 71 Conn. 316, 43 L. R. A. 490, in which it was held:

"A statute exempting college property from taxation in accordance with a well settled and long established public policy is to be construed reasonably so as to give full effect to the policy declared, as well as to avoid abuse and frustrate evasion, and is not within the rule of strict construction."

3rd. It has been seen above that at the time the Millsaps charter was granted Section 468 of the Code of 1880 was in force, and that this section provided an exemption on the "property, real or personal, belonging to . . . any incorporated institution for the education of youth, used exclusively for the benefit and support of such institution." During this period of the history of the state, exemptions from taxation on the property of many educational institutions were given in their respective charters. One of these is the charter, granted by the same session of the legislature that granted the Millsaps College charter, to Harpers Baptist College, the charter being found on page 563, *et seq.* of the Laws of 1880, which charter was approved February 19th, 1880, just two days before the charter of Millsaps College was approved. Section 1 of this charter provides that the corporation may acquire real or personal

property either by donation, bequest, or purchase. Section 2 of said charter gives an exemption to said property in the following language:

"The property, both real and personal, belonging to said college, or which may hereafter be acquired by bequest, donation, or purchase, together with all the instruments of music, chemical apparatus, and all other appliances used in conducting the said college in all its departments, shall be and the same are hereby entitled to all rights, privileges and immunities which are awarded to other similar educational institutions under the general laws of this state, *and shall be exempt from state and county taxes.*"

By the charter of this corporation the domicile had been placed in the country near Gloster, Mississippi, a small village, and that explains why there was no exemption from municipal taxation.

The charter of Grenada Collegiate Institution was granted by the Legislature of Mississippi, and approved March 8th, 1884. Section 11 of said charter gives an exemption as follows:

"Be it further enacted that all the property now owned and hereafter acquired by said corporation or held in trust for its use and benefit and said bond issued for the release and benefit of said corporation, shall be exempt from taxation."

These are merely samples of other charters granted to educational corporations prior to November, 1890, when the present Constitution of the State of Mississippi was adopted, which prohibits the legislature from granting charters by special act, and which also prohibits the granting by the legislature of exemptions by special act.

Until about a year before this case was decided in the court below when the legislature repealed same, the following statute, being Section 4252, Code of 1906, was in force:

“\* \* \* All the property, real and personal, and the revenues derived therefrom belonging to any religious or charitable society or benevolent order on the lodge system where no dividends are declared and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county and municipal taxes.”

Although Millsaps College never claimed an exemption under this section, because it claimed entirely under its charter which could not be repealed, yet under the agreed statement of facts in this case it could easily have qualified under the term “charitable society” used in said statute. Schools of learning are among the charities enumerated in the Statute of Elizabeth, *Russell v. Allen*, 107 U. S. 172. And an educational institution not conducted for profit is a charitable society notwithstanding it may charge some tuition fee. *Trustees Female Orphan School v. City of Louisville*, 100 Ky. 470; *Episcopal Academy v. Phila.*, 150 Pa. 565.

Under the above section, before it was repealed, in the case of *Catholic Diocese v. Adams County*, 110 Miss. 890, several houses owned and rented out by the Catholic Diocese of Natchez, an incorporated society, chartered under the laws of the State of Mississippi, was exempt from taxation, this case being decided in November, 1921.

The repeal of the above and other exemption statutes was the result of a wide spread agitation in the



state against exemptions from taxation. In May, 1923, the President of the Mississippi State Bar Association, who, by the way, is a member of the Supreme Court of Mississippi, in his annual address gave considerable attention to the question of exemptions from taxation, among other things, as reported on page 11 of the report of the proceedings, saying:

"But it must occur to the mind of the thinker, and to have it so considered is my object in mentioning it, that tax exemptions are growing to such an extent as to become alarming in our state . . . It may be sufficient to arouse investigation, to point out the fact that a vast amount of property is freed from taxation by legislative exemptions based upon so called public policy, or good of the public, often doubtful in truth."

This speech, with the statistics offered, was given wide publicity throughout the state, which resulted in the formation of a policy of restriction.

We are not concerned with the present day policy, and we call attention to it only for the purpose of also calling attention to what we consider the fundamental error made in the decision of this case. The court below, we think, with deference, was looking at this exemption to Millsaps College through present day lights, and based its opinion on present day ideas. It failed, as this court has said many courts do fail, to place itself back to the time when this exemption to Millsaps College was given, and consider it through the lights and according to the policy of the time when this charter was granted.

This court said, in *M. & O. R. R. Co. v. Tenn.*, 153 U. S. 486, 38 Law Ed. 793:

“• • • • • Legislative contracts especially should be read in the light of the public policy entertained and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail. In *Platt v. Union Pacific R. R. Co.*, 99 U. S. 48, Justice Strong expressed this proposition as follows: ‘There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. • • • But in endeavoring to ascertain what the Congress of 1862 intended we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.’”

This exemption was given thirty five years ago, at a time when the need for education by private enterprise was much greater than it is today. In those days the state was poor and was without schools and needed schools in which to educate the youth of the state, especially the poor youth, in view of Section 6 of the Millsaps charter. Here were some philanthropic people, who, in addition to contributing their share of the taxation to maintain what state schools there were, were also willing to establish this college, give of their own means towards its endowment, and seek donations from others, for the purpose of building up an endowment so as to more effectually carry out the provisions of Section 6 of the charter. These people would be unwilling, as is

suggested by this court in *Home of Friendless v. Rouse*, 75 U. S. 430, 19 Law Ed. 495, and *St. Anna's Asylum v. City of New Orleans*, 105 U. S. 362, 26 Law Ed. 1128, to give large sums for this purpose only to see it diminished by taxation. Therefore, we see a large spirit of liberality in this charter—an exemption of its campus and site and of its endowment fund from all taxation so long as it is kept open and maintained for the purposes contemplated by the charter.

Suppose the question here involved had arisen shortly after the time of the granting of the charter. Can there be any doubt how the court of that day would have decided the case? We submit there is no doubt the case would have been decided in favor of the college.

We furthermore submit there is now no doubt that on the face of the charter itself and without looking outside the charter the college is entitled to the exemption, but in all events, in view of the public policy of the time, the rule of construction as applied to a case like this, and the statutes *in pari materia*, there can certainly be no doubt that the college is entitled to the exemption.

The framers of the Federal Constitution, being wise, knew that one of the greatest and most harmful tendencies was to undertake to undo and revise under present circumstances what had been done in years gone by whereby vested rights had accrued under entirely different circumstances. Therefore, by Section 10 of Article I of the Constitution they said no state should pass a law impairing the obligation of a contract.

Fortunately, this court, in order to keep contract rights from being destroyed on arbitrary grounds by

state courts undertaking to place their decision on the construction of the contract alone, has held that if the result of said opinion is to give effect to some later law passed by the Legislature, which said later law has been set up as being violative of Section 10 of Article 1, this court will place its own independent construction on the contract, and decide for itself the terms thereof.

## POINT TWO

The exemption granted in the charter of Millsaps College was constitutional, and, when it was accepted and acted under by the college, became an irrevocable contract which, under Section Ten of Article One of the Constitution of the United States, cannot be repealed.

The circuit judge of the state, when the case was before him, held by written opinion (R. 10) that the exemption granted in the Millsaps charter was unconstitutional. He held, first, that the exemption was void from its very inception and never had any legal effect; second, that if he was mistaken in this, that then the said exemption was repealed by Section 4251, Code of 1906, which provides:

"The following property and no other shall be exempt from taxation . . . all property, real or personal, belonging to any college or institution for the education of youth, used directly and exclusively for such purposes."

Since the Supreme Court of the state did not affirm the opinion of the circuit judge, but merely the judgment rendered by him, we assume that the constitutionality of

the exemption, so far as any expression of the state court is concerned, is not in the case here at all. However, we must concede that if the Legislature was prohibited by the Constitution of 1869, which was in force at the time the charter was granted, from giving the exemption, then there was no contract. And if the college never had a valid contract, then there was nothing to repeal.

We assume, therefore, that it will be necessary for this court to pass, first, on the constitutionality of the exemption under the Mississippi Constitution of 1869, and second, whether under said Constitution, assuming the grant of the exemption to be valid in its inception, there was anything rendering said exemption subject to repeal. Of course, if counsel for the City of Jackson do not raise the constitutional question here this court will probably take the question as admitted and not consider same, though we take it in view of counsels' position below, that the question will be raised here. It should be borne in mind, however, that *prima facie* the exemption is constitutional, and if counsel for the city raises the question the burden will be on them to show that it is unconstitutional. We think we can show the exemption to be constitutional beyond all doubt.

The judge of the lower court, in his opinion, said:

"The chief question in this case is whether or not under the Constitution of 1869 the Legislature had power to grant an exemption from taxation that applied alone to a single person or corporation.

"Two sections of the Constitution of that time bear upon this question. Section 13 (meaning Sec-

tion 13 of Article 12) provides: 'The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals,' and Section 20 (still meaning of Article 12) is, 'Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as provided by law.' "

It will probably be aidful before going further into this discussion to trace briefly the history of the constitutional limitations in Mississippi with reference to corporations and the taxation of them.

The Constitution of 1832 imposed no limitations on the Legislature with reference to the taxation of corporations, even for pecuniary profits. Under it also charters of incorporation were granted by special acts of the Legislature, and in these special charters it was legal for the Legislature to give exemptions from taxation which, when given and accepted, became contracts and were irrevocable, being uniformly so held by the Supreme Court of Mississippi.

*M. & O. R. R. Co. v. Moseley*, 52 Miss. 127.

*Grand Gulf R. R. Co. v. Buck*, 53 Miss. 246.

*O'Donnell v. Bailey*, 24 Miss. 386.

In the first case cited, the Mississippi Supreme Court said:

"That such exemption from taxation contained in the charter of the corporation organized under it is ir repealable and inviolable is too well settled to need elucidation or citation of authorities. No principle has been more repeatedly or more violently assailed; none has more successfully withstood the shock of every assault."

Then came the Constitution of 1869, with Sections 13 and 20 of Article 12 thereof, mentioned by the circuit judge in his opinion, the said Section 13 of Article 12 providing:

"The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

And Section 20 providing:

"Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as provided by law."

There was nothing in this Constitution of 1869 rendering charters of incorporations subject to repeal or modification, and under it the Legislature still gave charters by special act, which had perpetual succession unless the time of its succession was limited in the charter itself. When the Millsaps charter was granted, Section 1631 of the Code of 1880 was in force, and it provided as follows:

"Every corporation created under this act, and all others not otherwise provided for, shall have succession for the time limited in the charter, and if no time be limited then perpetual succession."

While the Constitution of 1869 was in force, and until the adoption of the Constitution of 1890, in November of that year, it was the custom of the Legislature at every session thereof to grant many special charters, both to corporations for pecuniary profit and educational corporations not for profit, and in them to grant special

exemptions from taxation. The Millsaps College charter was granted while the Constitution of 1869 was in force.

While, of course, the Constitution of 1890 has no direct effect on the Millsaps charter or exemption, it will be helpful in the solution of the question involved to note its provisions in reference to these matters. We first turn to Article 7 of said Constitution dealing with corporations, and under Section 178 thereof it is provided, in part, as follows:

"Corporations shall be formed under general laws only. The Legislature shall have power to alter, amend, or repeal any charter of incorporation now existing and revisable, and any that may hereafter be created, whenever, in its opinion, it may be for the public interest to do so. Provided, however, that no injustice shall be done to the stock holders. No charter for any private corporation for pecuniary gain shall be granted for a longer period than ninety-nine years."

This section took away from the Legislature the power to grant special charters, and it was the first time in the history of the state that this had been done.

Then note Section 181 of the same Article 7, which, in part, provides:

"The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals . . . exemptions from taxation to which corporations are legally entitled at the adoption of this Constitution shall remain in full force and effect for the time of such exemption as expressed in their respective charters."



Note the Constitution of 1890 still makes a distinction between corporations for pecuniary gain and educational or charitable corporations.

Section 112 of Article 4 of the Constitution of 1890 provides:

"Taxation shall be equal and uniform throughout the state. Property shall be taxed in proportion to its value."

Note the difference in wording between this and Section 20 of Article 12 of the Constitution of 1869, whose place it took in our organic law.

We now come back to the opinion of the circuit judge of the state holding the Millsaps exemption unconstitutional. Note he says that Section 13 of Article 12 and Section 20 of Article 12 of the Constitution of 1869 bear upon the question. Section 13 of Article 12, however, by its very terms, applies solely and only to corporations for pecuniary profits, and, therefore, by its terms, by implication, left corporations not for pecuniary profits to be dealt with by the Legislature as it saw fit. However, it is evident the circuit judge looked upon Millsaps College as such a corporation as was controlled by the said Section 13. In doing so he committed a fundamental error. He was led into this view, we suppose, by the argument of counsel for the City of Jackson, who maintained that there was nothing in the Millsaps charter which prevented it from operating for pecuniary profits, and the mere fact that it did not so operate did not prevent it being controlled by Section 13 of Article 12.

However, it is quite manifest that Millsaps College is not a corporation for pecuniary profits as contemplated by said Section 13, and that therefore the said Section 13 has no application whatsoever to it. It is easy to see from the charter itself that the Legislature contemplated a corporation purely charitable and eleemosynary. There are no members of the corporation to whom any profit could be paid. It is organized solely for educational purposes, and by Section 6 it is provided that the cost of education shall be reduced by said corporation to the lowest point consistent with the operation of the college (not profit to any members), and "every reasonable effort shall be made to bring a collegiate education within the reach and ability of the poorer classes of this state."

The circuit judge also overlooked the stipulation of control by which it was agreed:

"Said college is not operated for profit and no profit is made. The cost to each student is reduced to the lowest point, the tuition for each student being only \$75.00 per year. All the dormitories are operated on a co-operative basis, each student paying only his prorata share of the cost, no profits whatever obtaining to the college. The income from the tuition fees, which is the only income from students, furnishes only a small part of the money necessary for the operation of the college, the balance coming from gifts and the income from the endowment fund, a part of which income is from rentals of said buildings."

So plain a proposition that under its charter and these facts Millsaps College is not a corporation for

pecuniary profits can hardly need authority, yet see *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776. On page 782 of the decision, as found in the American Reports, the Supreme Court of Illinois said:

"It is said that fees are charged for tuition. We suppose this to be the case with all educational institutions, with hardly an exception, if any. What is meant by 'pecuniary profit,' is 'for the pecuniary profit of its stockholders or members,' in the words of Section 26 (Rev. Stat. 1874, p. 290), before quoted. Such is not the purpose of this charter, but it is for educational purposes, and all the avails received are applied to the latter purposes. See *McDonal v. M. G. Hospital*, 120 Mass. 431, 21 Am. Rep. 529, on this point. The proof is, 'there is no pecuniary profit to the members of the corporation from this institution. There are no dividends declared, no money given to any member. The trustees themselves derive no personal profit. The corporation is not conducted for any other purpose than educational and charitable purposes.'"

See also on this point:

*People v. Meizer*, 90 N. Y. Supp. 488-489; 98 App. Div. 238.

This 13th Section of Article 12, depended upon by the circuit judge, being therefore entirely eliminated, the only question that remains is whether or not there is anything in Section 20 of Article 12 of the Constitution of 1869 which took away from the legislature the inherent power which it had always theretofore enjoyed — the power to grant to corporations such as Millsaps College an exemption by special charter; and if it

did not prohibit the granting thereof, is there anything in said section which renders same repealable by a subsequent legislature.

Our position is:

First. That there is absolutely nothing in the said Section 20 of Article 12 which took away from the legislature the power to grant this exemption in the charter to Millsaps College and that therefore the said exemption was constitutional when given.

Second. The said exemption in said charter being constitutional when given, and the charter being accepted and acted under, the exemption therein became an ir-repealable contract, there being nothing in said Section 20 of Article 12, or in any other provision in the Constitution of 1869, rendering same subject to repeal.

#### FIRST.

During the consideration of the first proposition a good many things bearing upon the second will necessarily be discussed, but this will render the discussion under the second head brief when reached.

This first question really depends on whether or not it was competent for the legislature, under the Constitution of 1869, to grant a good and valid exemption in a charter. Under the theory of the circuit judge the legislature was prohibited from granting in a special act an exemption to a single corporation. If it was competent for the legislature to grant an exemption in a charter at all, then necessarily such exemption was constitutional because all legislative charters are special acts.

It is further certainly true that if the legislature could grant to any corporation, either for profit or not for profit, in its charter, an exemption which was good in its inception, then Millsaps College is one of those corporations.

We will show that at the time the Millsaps charter was granted and this exemption granted in it, the law of the land, as decided by the Supreme Court, and as construed by the legislature in giving such charters, and by the executive department of the state in approving same, was that it was perfectly legal for the legislature to grant exemptions in special charters to special corporations, either for profit or not for profit. Under Section 13 of Article 12, however, such exemptions granted in such charters to corporations for pecuniary profit were subject to repeal at the will of a subsequent legislature, but were legal and valid during the time between the grant and such later repeal. This was decided in *Mississippi Mills v. Cook*, 56 Miss. 40, which we will later discuss. As to corporations not for pecuniary profit, such as Millsaps College, such exemptions could not be repealed, because they were not controlled by the said Section 13.

In the Mississippi Mills case, mentioned above, Section 20 of Article 12 was construed to mean, not that all property must be taxed but only that which was taxed should be taxed equally, uniformly, and according to value. Before the Constitution of 1869 was adopted the legislature could tax one class of property at one rate and another class at a different rate, and there was no

control of the legislature in the matter of equality and uniformity; and it was to correct this situation that the said Section 20 of Article 12 was adopted.

Now it was recognized by the Constitution of 1890, by the legislature, by the governor of the state, and the Supreme Court of the state, that under the Constitution of 1869 the legislature had full power to grant to any corporation, either for profit or not for profit, an exemption in its charter which was good when given and continued to be good, except that in the case of corporations for profit they could be repealed under said Section 13, and we will show this to be true in the order named.

Note that Section 181 of Article 7 of the Constitution of 1890 provided:

"The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals  
• • • exemptions from taxation to which corporations are legally entitled at the adoption of this constitution shall remain in full force and effect for the time of such exemption *as expressed in their respective charters*" (italics ours).

The words "in their respective charters" are full of meaning. According to the theory of the circuit judge, there were no legal exemptions in special charters, because, according to him, none such could be granted. But here the people themselves in convention assembled, with some of the best lawyers Mississippi ever produced in the said convention, fully recognized the authority of the legislature prior to the adoption of the

Constitution of 1890 to grant an exemption by special charter.

But this is not all. By Section 90 of the same Constitution of 1890, it is provided:

"The legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz: • • •

" 'H.' Exemption of property from taxation, or from levy, or sale."

If the circuit judge is correct that under the Constitution of 1869 no exemption could be granted in a charter to a single corporation, and since both Sections 13 and 20 of Article 12 of the Constitution of 1869 were brought forward in the Constitution of 1890 and greatly added to and strengthened, why do we find the Constitutional Convention of 1890 providing that no exemption can be given by local, private, or special law? Certainly a charter of incorporation is not only local and private but also special.

Next, consider the construction put upon the constitution of 1869 by the legislature. At every session thereof between the time of the adoption of the Constitution of 1869 and that of 1890 many special charters were granted both to corporations for profit and not for profit, and in them various exemptions from taxation. We have filed in an appendix hereto a list of twenty-six separate educational institutions to each of which an exemption from taxation was granted by a special charter enacted after the adoption of the Con-

stitution of 1869 and before the Constitution of 1890. These were selected casually and do not purport to be all that were granted, and do not take into consideration the many and various exemptions given by charter to private corporations for pecuniary profits.

The governor of the state in approving these charters was required to determine their constitutionality.

Contemporaneous construction of a constitutional provision or of a statute by the legislative and executive departments of the state is of great weight in determining its true construction, especially where it extends over a period of many years. It has been fifty six years since the adoption of the Constitution of 1869, and these exemptions in the charters of some of these educational institutions have stood for that length of time without their constitutionality ever having been questioned. It was left to the circuit judge to be the first to ever question same, and this, too, after the courts, as we will show, had judicially upheld the constitutionality of such exemptions, even to corporations for pecuniary profits, though in the case of these, subject to repeal under Section 13.

We come to the judicial construction. The first case is that of *Mississippi Mills v. Cook*, 56 Miss. 49, already mentioned. In this case the charter of Mississippi Mills was amended so as to give it an exemption from taxation, which was given to it alone and not to other corporations in its class. While the Mississippi Mills was a corporation for pecuniary profit, certainly if it was competent for the legislature to grant to it in its



charter an exemption from taxation, then it was competent to grant to Millsaps College, a corporation not for profit, a valid exemption from taxation in its charter. In this Mississippi Mills case, both Sections 13 and 20 of Article 12 of the Constitution of 1869 came up for consideration, discussion, and adjudication.

The Mississippi Mills was incorporated by the legislature on the 13th day of April, 1871 by a special charter. On April 1st, 1872 the legislature passed "An act to encourage the introduction of machinery and the establishing of factories in the State of Mississippi." By the terms of this act manufacturing companies "not in operation before the passage of this act" were given exemptions from taxation. The Mississippi Mills, as disclosed by the facts as reported, was a going concern and in operation at the time of and before this exemption act was passed, and, therefore, did not and could not claim the benefit of its provisions. However, on the 17th day of April, 1873, the Mississippi Mills did secure from the Legislature an amendment to its charter under and by which it was provided that the general exemption granted on April 1st, 1872 to factories thereafter established "be and they are hereby extended to the Mississippi Mills, in the County of Copiah, and that the provisions and benefits of this provision shall be a part of the charter of said company, and shall apply to each and every manufacturing department of the same."

Note carefully that this general exemption of April 1st, 1872 was not amended so as to extend to all factories already established and in operation before the adoption of the act, but singled out the Mississippi Mills alone.

In 1877 the legislature passed an act by and under which the exemption granted in the act of April 1st, 1872, and all acts amendatory thereto, or acts extending the provisions thereof, were modified and very much narrowed. The Mississippi Mills, in the law suit which followed, claimed that the exemption granted to it in the amendment to its charter constituted a contract, and that the act of 1877, which the tax collector threatened to execute against it, impaired the obligation of such contract and was, therefore, unconstitutional, and in violation of the Constitution of the United States. The tax collector, Cook, prosecuted the case on the part of the State and County on the theory that the exemption granted to the Mississippi Mills in its charter was in violation of Sections 13 and 20 of Article 12 of the Constitution of 1869, and the whole case was fought out on the question as to the meaning and effect of the said two sections.

The opinion of Chief Justice Smrall begins as follows:

"The primary and general question for discussion and decision is the meaning and effect of the thirteenth and twentieth sections of the constitution. What is the meaning and for what purposes were the thirteenth and twentieth sections of the twelfth Article of the constitution adopted?"

The decision of the court was that while there was nothing in these sections prohibiting the legislature from granting the exemption as it did, yet the effect of Section 13 providing that property of corporations for

pecuniary profit shall be subject to taxation the same as that of individuals, rendered any such exemption, although given in the charter and duly accepted and acted on by the corporation, subject to repeal. It was, therefore, decided and held that the act of 1877 narrowing the exemption granted in the amendment to the charter partially repealed the exemption granted to the Mississippi Mills in its charter, and was not in violation of the contract clause of the Federal Constitution, because at the time the amendment to the charter was granted and accepted the 13th Section of Article 12 was in the Constitution of 1869, which prohibited the legislature granting an immunity from taxation to a corporation for pecuniary profits which was not subject to repeal.

Judge Campbell said:

"• • • The true view is that this provision (the thirteenth section) fixes, beyond legislative act, the condition of the property of all corporations for pecuniary profit as being always liable to the exercise of the taxing power, so as to subject it, at the will of the legislature, to the same taxation as the property of individuals may be subjected to • • • It may not be taxed, but it must ever be liable. It need not be subjected, but it must always be subject to taxation, the same as that of individuals, for the constitution so declares."

The court then concluded that it was competent for the legislature to modify or repeal the exemption granted to this corporation for pecuniary profits; but bear in mind that the act until repealed was perfectly valid. Each of the three judges, that is, Chief Justice Simrall,

Justice Campbell, and Justice Chalmers, rendered separate written opinions in the case. Chief Justice Simrall and Justice Campbell concurred in the conclusion that under Section 13 of Article 12 of the Constitution of 1869 the legislature did not have the authority to grant to a corporation for pecuniary profits an ir-repealable contract of exemption, but thought that this charter exemption to Mississippi Mills was good until repealed. • • •

• • • • The words are mandatory, and are perpetually addressed to the legislature, the department of government charged with the duty and the power to tax. The command is, 'Do nothing, refrain from any act or law, by which the property of bodies politic, for profit, shall be loosed or acquitted from continuous subjectibility to taxation.' "

Justice Chalmers disagreed with Chief Justice Simrall and Justice Campbell as to their interpretation of Section 13, his view being the contention of Mississippi Mills that it had an irrevocable contract of exemption under the Federal Constitution was correct, even in the face of Section 13 of Article 12. His view was, as seen from his opinion, that there was nothing in the said Section 13 which took away from the legislature the authority which it had always had of granting for a consideration deemed sufficient by the legislature, in the charter of a corporation, even for pecuniary profits, an exemption which should be ir-repealable, saying

• • • • I find no such magic as my colleagues in the words, 'shall be subject to taxation, the same

as that of individuals.' To me they have no meaning, other than that which would be conveyed by the equivalent phrases, 'shall be viewed in the matter of taxation'; or, 'shall be treated'; or 'shall be dealt with,' the same as that of, individuals, or 'shall be liable to taxation, the same as that of individuals.' These, and many similar phrases which might perhaps be suggested, all convey but one and the same idea, namely, that the law-giver, in the imposition of taxes, shall know no difference between the property of individuals and that of corporations for pecuniary profits. Alike they shall be taxed equally, uniformly, and *ad valorem*; alike they may be omitted from the tax lists for the current year; alike they may be made the subject of a contract of exemption, which, when made, shall be irrevocable. It is said that the injunction is, that the property of corporations 'shall be subject to taxation'; that this means that it shall ever be kept subject, and hence it can never be so dealt with that it will not be subject. If the sentence simply was, that 'the property of all corporations for pecuniary profits shall be subject to taxation,' it is possible that it might bear this construction, though it would be a most lame and inadequate method of expressing the idea. But the injunction is not that it shall be subject, or shall be kept subject, to taxation, but that it shall be subject 'the same as that of individuals.' Hence, it follows that whatever may be done with reference to individual property may be done with reference to it."

We quote this to show that one of the judges thought that irrevocable contracts of exemption could be given in their charters even to corporations for pecuniary profits, notwithstanding Section 13. However, this is the only difference that arose between the judges

in this case. As to everything else they were in complete accord. This is especially true as to the proper interpretation of Section 20 of Article 12. As to this section they all agreed that it does not require the taxation of all property and prohibit the exemption of any. All that it requires, they decided, was that all property that was taxed should be taxed equally, uniformly and ad valorem; that is, according to value. It had no reference whatever to the exemption vel non of property, its only reference being as to how property that was taxed should be taxed. They all concurred in holding that there was nothing in said Section 20 of Article 12 to prevent the legislature giving a contract of exemption in a charter which would become irrevocable, and it is quite evident, had it not been for the said Section 13, the contention of Mississippi Mills that it had an irrevocable contract of exemption by this special amendment to its charter would have been upheld. The fact that the exemption to the Mississippi Mills was upheld as good so long as it was not repealed shows conclusively that this would have been the case.

Justice Chalmers said:

"We all concur in holding that the twentieth section does not require the taxation of all the property in the state, but only that all that is taxed shall be taxed uniformly, equally, and according to value  
• • •

"It is quite manifest that there is nothing in these requirements of uniformity and equality, and of ad valorem taxation, which in the slightest degree militates against that inherent right to con-

tract away the taxing power which the Supreme Court of the United States declares to reside in every state legislature, unless restricted by the organic law.

"If a proposition so plain needed to be strengthened, its correctness is placed beyond controversy by the fact that clauses substantially similar to our twentieth section are found in the constitutions of perhaps a third of the states of the union; but in none of them has it been held that their effect was to forbid such contracts or charters. My colleagues concede this. They admit that there is nothing in the constitution to prohibit an irrepensible exemption, by contract, of the property of individuals. They admit that under the settled doctrine of the Supreme Court of the United States we would be compelled to uphold such a contract, if made with reference to the property of an individual. They confess their inability to discover any prohibition of such power in Section 20. It follows, therefore, that said section contains an implied recognition of legislative power to make such contracts."

Please bear in mind that we are not quoting Justice Chalmers as authority on any matters in this case in which he was dissenting, but only on matters in which all three of the judges concurred. Chief Justice Simrall was in full accord with Justice Chalmers that a corporation not for pecuniary profit could be given an irrepensible contract of exemption by special charter. In one part of his opinion he said:

"\* \* \* The convention (note he says "Convention," thus embracing the whole constitution) excluded altogether those corporate bodies purely eleemosynary, whose chief object is to dispense benefits to the public, rather than make profit for

their founders—such as asylums for the sick, aged, or orphans; institutions of learning, and to promote christianity.

"The purpose of the exclusion was, not to negative the power to tax them, but to leave them as they were before, and as they would have been without this section. In the legislative history of the state, such corporations never had been taxed. It seemed to have been the settled policy that they should not be. The convention left these charitable and eleemosynary bodies corporate in possession of their traditional immunity. *It simply declined to make any rule respecting them* (italics ours).

"The omission (purposely) of these bodies from the section gives force to the view already advanced, that there is nothing in the twentieth section, nor elsewhere in the constitution, imperative on the legislature to tax all property and exempt none. For it is manifest that these corporations were left out of the thirteenth section so that they might continue to enjoy the legislative exemption or pretermission from taxation. The idea embodied is, that whilst the property of corporations for profit shall be subject to taxation, there is a distinction between them and those bodies associated under charters to teach the Christian religion, to promote education, or provide asylums for the sick and destitute; these institutions are founded to dispense benefits to society, and not to those who establish them."

Turning to Justice Campbell's view of Section 20, we find:

"\* \* \* The first clause of Section 20 establishes the rule of equality and uniformity throughout the state in taxation, and the other requires that all property shall be taxed in proportion to its value, to be ascertained as directed by law. This fixes



the principle by which property shall be taxed, and leaves the legislature free to tax other things than property, as it may deem to be best, subject only to the rule of equality and uniformity as declared by the first part of the section. The words 'all property shall be taxed in proportion to its value' do not require that all property shall be taxed, and deny to the legislature the right to exempt any. The purpose of their employment is to fix the rule for the taxation of property. Before the adoption of the present constitution, the power and the practice existed to tax property without regard to value. The intent of this provision was to protect against the taxation of property except in proportion to its value, to be ascertained as directed by law. The ad valorem rule in taxing property is secured, and the ascertainment of this value, as directed by law, is made necessary, so that the proportion to its value may be borne in the matter of taxation of property. If the purpose had been to prohibit exemption from taxation, it would have been declared in unmistakable terms. It was easy to declare that the legislature shall not exempt any property from taxation. The omission of such a provision makes it certain that no prohibition was thought of."

Judge Campbell then quoted with approval what was said by the Supreme Court of Missouri construing a very much similar section in its constitution, saying:

"\* \* \* The judge delivering the opinion of the court (*The State v. North*, 27 Mo. 464) said this provision 'has been repeatedly construed by this court to mean, not that all the property in the state must be taxed, but that when any article of property is selected for taxation, it shall be taxed in proportion to its value, and not specifically.'"

This case was decided in 1888, and was fully and completely the law of the land at the time Millsaps charter was granted on February 5, 1890. It fully and definitely settled the proposition here under discussion that the exemption given to Millsaps College in its charter was valid and constitutional in its inception. It also, as a matter of fact, fully settles the second proposition to be discussed under this head, to wit, that the said exemption so granted and accepted and acted under became a contract which cannot be repealed by subsequent legislation.

Next came the case of *McCulloch v. Stone*, 64 Miss. 380, decided by the Supreme Court of Mississippi in 1886, four years before this charter to Millsaps was granted. This is a case in which a special charter to a railroad was granted by the legislature in 1884, and an exemption from taxation was granted in said charter for a certain length of time. The constitutionality of the exemption under Section 13 of Article 12 was raised by counsel opposed to the railroad. While the decision of the case went off on other grounds, yet the principle that under the Constitution of 1869 the legislature had authority to grant special exemptions by special charters, even to corporations for pecuniary profit, subject, however, in the case of this, to repeal by subsequent legislation, was thoroughly recognized.

The next case is that of *F. & M. V. R. R. Co. v. Thomas*, 65 Miss. 553 decided by the Mississippi Supreme Court in 1888, a little over two years before the Millsaps charter was granted. In this case it was

thoroughly recognized that it was permissible for the legislature to grant to this railroad company a special exemption in a special charter. This charter was granted in 1882.

The case of *Railroad Company v. Lambert*, 70 Miss. 779, decided that there was nothing in the constitution of 1869 to prohibit the legislature from singling out a corporation, even for pecuniary profit, and by special charter give to it a special exemption from taxation, which exemption is valid and binding until subsequently repealed under authority of Section 13 of Article 12 of the constitution of 1869. For the sake of brevity we quote the first syllabus of this case, found on page 779 of 70 Miss.:

“NONE. EXEMPTION FROM TAXATION.  
LEGISLATURE MOBILE & NORTHWESTERN  
RAILROAD. CHARTER.

“Section 21 of the Act of July 20th, 1870 incorporating the Mobile & Northwestern Railroad Company, providing that all taxes to which it might be subject for thirty years should be applied to payment for constructing the road or debts incurred therefor, unless its annual net earnings should exceed eight per cent, and that the affidavit of the president or cashier that such application had been made, should be accepted by tax collectors in lieu of money for such taxes, was, in effect, an exemption from taxation upon the conditions named, *and this exemption the legislature had the power to confer, but not to make irrevocable.* *Mississippi Mills v. Child*, 56 Miss. 40” (Italics ours).

These exemptions in these charters, and many others like them which could be mentioned, serve further to

show the construction placed by the legislature and executive departments of the state, on the Constitution of 1869.

It is, therefore, seen that the legislative, the executive, and the judicial departments of the state united in construing the constitution of 1869 as permitting the legislature to grant special exemptions in special charters to single corporations. It has also been seen that the Constitutional Convention of 1890 fully recognized the principle. We cannot imagine a stronger case for the application of that wholesome doctrine of the rule of property announced in the case of *Wisconsin Lumber Company v. State*, 97 Miss. 571, and in *Hall v. Wells*, 54 Miss. 300, in which latter case the Supreme Court of Mississippi said:

"The legislature, the people and the courts of original jurisdiction acted upon that meaning of the words 'orphans' business' from 1817 to 1860, when a different construction was put on them in the case of *Stewart v. Morrison*, *ubi supra*. It is believed that during that long period of over forty years the legislative and popular interpretation had been as I have stated; and as necessity arose, guardianship was granted of any and all minors, without regard to whether they had living fathers or not. For the necessity was just as great where the minor had property for the guardianship if the father were living as if he were dead. Assuming that this long-continued practical rendering of the words was an error, yet the principle is well settled that the practical construction given to a statute or constitution by the officers of the state, and acted upon by the people, is decisive. *Union Ins. Co. v. Hobe*, 21 How. (U. S.) 35 (16 L. Ed. 61). Contemporaneous construction under which rights of

property have been acquired should be followed, if possible. *In re Warfield*, 22 Cal. 51 (83 Am. Dec. 49). These are persuasive reasons why the courts should not overturn the long-established practical construction, although erroneous.

"The principle has a wider and more beneficent range. If the courts do place a different construction on a statute or constitution than that long acquiesced in practically, contracts made or rights of property acquired before the change shall be respected. The rule was clearly announced and applied in *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175, 206 (17 L. Ed. 520), 'that if the contract when made was valid by the laws of the state, as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.' Also *Ohio Life Ins. & Trust Co. v. Deholt*, 16 How. (U. S.) 416, 432 (14 L. Ed. 997); *Haremyer v. Iowa County*, 3 Wall. (U. S.) 294, 303 (18 L. Ed. 38); *The City v. Lamson*, 9 Wall. (U. S.) 477, 482 (.... L. Ed. 725); *Milligan v. Dickson*, Pet. C. C. 433, 439."

See also the case of *Louisiana v. Pillsbury*, 105 U. S. 278, 26 Law Ed. 1090, in which the Supreme Court, reviewing many of the decisions on this point, said:

"From the extended reference to the adjudication of the Supreme Court of Louisiana, upon the Constitution of 1845 requiring uniformity and equality in taxation, there can be no serious question as to the validity of the Act of 1852, so far as the consolidated bonds of the City of New Orleans are concerned, and the provisions made by it and the supplementary act for the annual levy of a tax of \$650,000.00 to pay the interest and reduce the principal. The decisions upon the clause of the constitu-

tion of 1852 are corroborative of the correctness of the construction originally placed upon the clause of the Constitution of 1845. Whether such a construction was a sound one is not an open question, in considering the validity of the bonds. The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitute a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two states, expressed in the same terms, is construed differently by their higher courts, they are treated by us as different laws each embodying the particular construction of its own state and enforced in accordance with it in all cases arising under it. *Christy v. Pridgen*, 4 Wall. 197 (71 U. S. XVIII, 322); and *Shelby v. Guy*, 11 Wheat. 367. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the chief justice in the recent case of *Douglass v. Pike County*, 101 U. S. 686 (XXV, 971). 'The true rule,' he observes, 'is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all in-

tents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.' See, also, *Gelpcke v. Dubuque*, 1 Wall. 175 (68 U. S. XVII, 520); *Havemyer v. Iowa County*, 3 Wall. 294 (70 U. S. XVIII, 38); *Thompson v. Lee County*, 3 Wall. 327 (70 U. S. XVIII, 177); *Lee Co. v. Rogers*, 7 Wall. 181 (74 U. S. XIX, 160); *Chicago v. Sheldon*, 9 Wall. 50 (76 U. S. XIX, 594); *Olcott v. Supervisors*, 16 Wall. 678 (83 U. S. XXI, 382); *Fairfield v. Gallatin Co.*, 100 U. S. 47 (XXV, 544)."

It is quite easy to see why no court would construe Section 20 of Article 12 of the Constitution of 1869 as a negation of legislative power to grant an exemption by charter unless it was on the theory that it required the taxation of all property and allowed the exemption of none. The Supreme Courts of one or two states, in whose constitutions were uniformity and equality clauses substantially similar to that in the Mississippi Constitution, held, under that part of the clause which says all property shall be taxed according to value, that no property whatever can be exempted. The Supreme Court of Mississippi, however, followed the great majority of the states, and held that it did not require the taxation of all property, but only that all property that was taxed should be taxed uniformly, equally and ad valorem.

There is no sort of hint in any decision of the Supreme Court of Mississippi that Section 20 of Article 12 ever had the effect either to prohibit the legislature from granting a valid exemption in a charter, or of subjecting same to repeal after it had been granted.

This is in direct accord with the Supreme Courts of other states in whose constitutions were similar clauses.

Take for instance the State of Louisiana, adjoining Mississippi on the south. By Section 127 of its Constitution of 1845 it was provided:

"Taxation shall be equal and uniform throughout the state. After the year 1848 all property on which taxes may be levied in this state shall be taxed in proportion to its value to be ascertained as provided by law."

The first sentence of the Mississippi and Louisiana sections, to-wit, "Taxation shall be equal and uniform throughout the state," are exactly identical. The construction placed by the Mississippi Supreme Court on the next sentence has made it identical with that of the last sentence of the Louisiana Section.

In the case of *St. Anna's Asylum v. Parker*, 109 La. 33 So. 613, the Supreme Court of Louisiana held explicitly and definitely that a charter exemption to St. Anna's Asylum did not violate the above quoted section of the Louisiana constitution, and held the said exemption to be a contract and irrevocable under the Constitution of the United States. The facts of this Louisiana case are identical to the facts of the case at bar:

First: The property sought to be taxed was a cotton factory in the City of New Orleans, which was owned by St. Anna's Asylum, a corporation not for profit, and was rented out, the revenues being used to help pay the operating expenses of the asylum.



Second: The charter to St. Anna's Asylum exempting this property was given after the above constitutional section went in force.

Third: At the time the St. Anna's Asylum charter was given there was a general act in force classifying charitable property for exemption, which was not near as liberal as the exemption given to St. Anna's Asylum. (In the case at bar the exemption given to Millsaps College was the same as that given by general statute.)

Fourth: A later legislative act undertook to repeal this exemption in St. Anna's Asylum charter.

Fifth: Counsel for the taxing authorities attacked the exemption given in this charter as violative of the uniformity and equality clause of the Louisiana Constitution.

The Supreme Court of Louisiana held, just as the Mississippi Supreme Court has held, that there was nothing in the said equality and uniformity clause to prevent the legislature granting by special charter an irrevocable exemption from taxation.

The Constitution of 1834 of the State of Tennessee, bordering Mississippi on the north, had a provision reading as follows:

"All property shall be taxed according to its value, the value to be ascertained in such manner as the legislature shall direct, so that the same shall be equal and uniform throughout the state."

In 1858 the University of the South, popularly known as Sewanee, was given a charter by which a large lot of land was exempted from taxation. In 1888

this university owned the entire village of Sewanee, all the dwellings, all the stores, the hotel, etc., and rented them all out and used the revenue for the support of the institution. In that year, the County of Franklin, in which the University of the South was located, undertook to tax this property, and claimed that the exemption was unconstitutional under the above clause. In this case, being the case of *University of the South v. Skidmore*, 9 Southwestern 892, the Supreme Court of Tennessee held that the said charter exemption did not violate the said clause of the constitution, and that the said exemption was valid.

See also the case of *M. & O. R. R. Co. v. Tenn.*, 153 U. S. 486, 38 Law Ed. 793, in which the same section of the Tennessee Constitution was involved, and in which this court held that the Tennessee Supreme Court, in several cases, had decided that under the said Section of the Tennessee Constitution contracts of exemption could be given to corporations for pecuniary profits, and upheld such an exemption in the charter of the M. & O. R. R. Co.

The Constitution of the State of Illinois had a provision that,

"Taxes shall be levied so that each person shall pay in proportion to the value of his property; and that where corporate authorities of the counties, cities, etc., are authorized to levy and collect taxes for corporate purposes, the taxes shall be uniform in respect to persons and property."

It was held in *I. C. R. R. Co. v. the County of McLean*, 17 Ill. Rep. 291, that this did not take away from

the Legislature of Illinois the power to grant a contract of exemption in a charter. (This is the famous case in which Abraham Lincoln represented the I. C. R. R. Co.) To the same effect are *Hunsacker v. Wright*, 30 Ill. 146; *Newstadt v. I. C. R. R. Co.*, 31 Ill. 434. See also the case of *Chicago v. Sheldon*, 76 U. S. 50, 19 Law Ed. 594, in which this court held that an exemption granted Sheldon by a contract was not violative of the Illinois Constitution, and was, therefore, irrevocable.

We submit the foregoing considerations prove the constitutionality of the exemption to Millsaps College at its inception beyond all doubt. However, even if there were any doubt, under the rule all doubts would have to be resolved in favor of the validity of the exemption. Its validity is presumed *prima facie*. It must be sustained, if possible, and the burden is on the city to prove its unconstitutionality.

In *Natchez R. R. Co. v. Crauford*, (Miss.) 55 So. 596, the Supreme Court of Mississippi said:

"The constitutionality of a statute is *prima facie* presumed, because the legislature in adopting it is required to determine its constitutionality. All doubts are resolved in favor of the constitutionality of a statute. If there is reasonable doubt of its constitutionality it must be upheld by the courts."

In *University of Mississippi v. Waugh*, 105 Miss. 623, 62 So. 827, L. R. A. 1915 D 588, Ann. Cas. 1916 E, the Supreme Court of Mississippi said:

"All the acts of the legislature are to be upheld by the courts unless it is plainly apparent that they conflict with the organic law after solving all doubts in favor of their validity."

Chief Justice Marshall, in the case of *Fletcher v. Peck*, 6 Cranch 128, said:

"The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Under this rule certainly the constitutionality of this exemption must be upheld.

#### SECOND.

**The exemption to Millsaps College, being constitutional when given, and being accepted and acted under, became a contract and is not subject to repeal.**

We think it is apparent from the foregoing discussion not only that the exemption to the college is constitutional but that it is not subject to repeal by a subsequent legislature. Anyone who contends that there is anything in the Constitution of 1869 which renders this exemption, constitutional when given, subject to repeal must point out the provision having such effect. And it must be convincing beyond doubt that any such provision has the effect ascribed to it.

We submit there is no such provision. Section 20 of Article 12 providing "Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value to be ascertained as provided by law" certainly does not authorize the repeal of a valid exemption, and no such meaning could be given to it by the wildest stretch of the imagination. No court in Mississippi has ever insinuated that it had such effect.

There is only one section of the Constitution of 1869 which has ever been held to render an exemption given in a charter of incorporation subject to repeal by a subsequent legislature. This is Section 13 Article 12 providing "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals." It is beyond dispute that it was solely and only under this section the court in the Mississippi Mills case, *supra*, held the exemption in the charter of the Mills subject to repeal. Witness again what the court said in that case:

"\* \* \* The true view is that this provision (the thirteenth section) fixes, beyond legislative act, the condition of the property of all corporations for pecuniary profit as being always liable to the exercise of the taxing power, so as to subject it, at the will of the legislature, to the same taxation as the property of individuals may be subjected to. \* \* \* It may not be taxed, but it must ever be liable. It need not be subjected, but it must always be subject, to taxation, the same as that of individuals, for the constitution so declares."

And again:

"\* \* \* The words are mandatory, and are perpetually addressed to the legislature, the department of government charged with the duty and the power to tax. The command is, 'Do nothing, refrain from any act or law, by which the property of bodies politic, for profit, shall be loosed or acquitted from continuous subjectibility to taxation.'"

In the Lambert case, 70 Miss. 779, Judge Campbell, who was the author of the two foregoing quotations, said:

"In 1878 this court interpreted Section 13 Article 12 of the Constitution of 1869 to mean that the property of corporations for pecuniary profit could not be placed beyond the reach of the taxing power; that the legislature could forbear, during pleasure, to tax, but could at any time revoke a grant of immunity from taxation contained in any act passed since the adoption of the Constitution of 1869. *Mills v. Cook*, 56 Miss. 40."

The circuit judge, in holding the Millsaps exemption had been repealed, cited the Mississippi Mills case as authority. Thus again, it is evident, he thought Millsaps College such a corporation as was controlled by Section 13. He further said: "In the case of *Adams v. Railroad Co.*, 77 Miss. 273, the court said: 'The Mississippi Mills case decided no irrevocable exemption was constitutional.' " It is quite apparent the Mississippi Mills case held no such thing, and while there is a general statement in the Adams case to the above effect, yet the court in that case was dealing with and talking about a corporation for pecuniary profits. The Mississippi Mills case held only that there could be no irrevocable exemption to a corporation for pecuniary profits.

There is nothing in the case of *Adams v. Railroad Company*, *supra*, adverse to the contention of the college here, but, on the other hand sustains its position that it was under Section 13 of Article 12 that exemptions in the charters of corporations for gain were held revocable.

The railroad company claimed under a charter exemption granted while the Constitution of 1869 was in

force. However, there had been a consolidation (not a merger as was held) of several railroads, which consolidation took place some two years subsequent to the adoption of the Constitution of 1890. The main and primary ground of the decision in the case was that the consolidation was equivalent to the formation of a new corporation, and having taken place subsequent to the adoption of the Constitution of 1890, was controlled by that constitution, which prevented exemptions by special act, the court relying mainly on *Keokuk R. R. Co. v. Mo.*, 152 U. S. 301. Another ground of the decision, found on page 292 of 77 Miss., is that the exemption in the charter had been repealed by Section 3744 of the Code of 1892, under the authority of *Mississippi Mills v. Cook*, and later cases holding that such exemptions to corporations for pecuniary profits were repealable. The court said:

"The Code of 1892 provides for the exemption of all property which is to be exempted in Section 3744, and railroads are not mentioned in that section. The provision of that section is as follows: 'The following property and no other shall be exempt from taxation,' which declaration is as positive and emphatic an exclusion of all railroad corporations as language can furnish."

A third ground of the holding in that case was that the exemption granted in the charter to the railroad company provided in its face specifically that the said exemption was irrepealable. In view of the holding in the *Mississippi Mills* case that no irrepealable contract of exemption could be given to a corporation for

pecuniary profit, the court in the Adams case held that this exemption on its face, being made irrevocable, was therefore unconstitutional and void from its very inception. This Adams case said that the court in the Mississippi Mills case looked too narrowly to the words "subject to" in Section 13 of Article 12 of the Constitution of 1869, providing that the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals. It held, with one of the judges dissenting from the view, that this clause meant not only that the property of corporations for pecuniary profits shall remain subject to taxation the same as that of individuals, but must actually be taxed when and as the property of individuals is taxed. The Adams case, therefore, overruled this feature of the holding in the Mississippi Mills case, saying, at the bottom of page 285 and top of page 286 of the opinion:

"It is that feature of the decision thus holding that this Section 13 merely permitted the taxation of such corporations but did not require that taxation whenever the property of individuals was taxed and in just the same manner in all respects as the property of individuals was taxed, which we now condemn and overrule. In no other respect do we interfere with the decision in that case."

This left the construction placed by the court in the Mississippi Mills case on Section 20 of Article 12 in full force and effect, changing it only as it applied to Section 13 of Article 12. It also shows the court fully recognized that it was under Section 13 of Article 12 that exemptions to corporations for profit were held repeal-



able. This Adams case was decided in March, 1899, a little over nine years after the Millsaps charter had been granted.

It has<sup>3</sup> already been sufficiently shown that Millsaps College is not a corporation for pecuniary profits and, therefore, not controlled in the least by Section 13 of Article 12. It is specifically charged in the original petition of the college that it is not operated for profit and this petition was adopted by stipulation of counsel, as the agreed statement of facts. Besides, the charter shows it is not a corporation for profit. Indeed, it is most remarkable that the learned circuit judge should have fallen into the error of thinking Section 13 of Article 12 has any effect on this exemption.

As to Section 20 of Article 12, we refer the court to the view expressed by each of the judges in the Mississippi Mills case. We quoted from these views in discussing the preceding point. Suffice it here to say that they were unanimous in holding that said Section 20 did not prevent exemptions by special charter and did not render same repealable. On the other hand, Chief Justice Simrall, in the Mississippi Mills case, specifically said the convention (of 1869) left corporations such as Millsaps College just as they were before said convention and "simply declined to make any rule respecting them." And Judge Chalmers said "My colleagues concede this. They admit there is nothing in the constitution to prohibit an irrevocable exemption, by contract, of the property of individuals. They admit that under the settled doctrine of the Supreme Court of the United

States we would be compelled to uphold such a contract, if made with reference to the property of an individual. They confess their inability to discover any prohibition of such power in Section 20."

It follows from the foregoing that the exemption to Millsaps College is not subject to repeal. This being so it cannot be repealed without conflicting with Section 10 Article 1 of the Federal Constitution. Section 4251 Code of 1906, therefore, when given effect as subjecting the property herein to taxation, is violative of said constitution.

Nothing is better settled than the proposition that a valid exemption from taxation given in a charter which is accepted and acted under becomes a contract and is not subject to repeal unless there is something in the organic law making it so.

*Home of Friendless v. Rouse*, 75 U. S. 430, 19 Law Ed. 495.

*Washington University v. Rouse*, 75 U. S. 439, 19 Law Ed. 498.

*St. Anna's Asylum v. City of New Orleans*, 105 U. S. 362, 26 Law Ed. 1128.

*Northwestern University v. People*, 99 U. S. 309, 25 Law Ed. 387.

*M. & O. R. R. Co. v. Moseley*, 52 Miss. 127.

*Grand Gulf R. R. Co. v. Buck*, 53 Miss. 246.

*O'Donnell v. Badley*, 24 Miss. 386.

*Miss. R. R. Com. v. G. & S. I. R. R. Co.*, 78 Miss. 751, 90 Miss. 561.

*State v. Ala. Bible Society*, 32 So. Rep. 1011.

In *Home of Friendless v. Rouse*, *supra*, the court said:

"It is settled by repeated adjudications of this court, that the state may by contract, based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period, or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the state if the charter containing it is accepted." (Citing authorities.)

### POINT THREE.

**The charter fully authorizes the acceptance and holding of the property involved by the corporation.**

Counsel for the city contended below that the charter does not authorize the college to hold the property involved, and, therefore, the college cannot hold it free from taxation. This would be true under the Mississippi decisions if there were no authority to hold it. There is no merit, as we think, in the proposition, for the charter fully authorizes the college to hold the property.

In Section 1 of the charter, giving the general powers of the corporation, it is provided:

"\* \* \* and have a common seal and break the same at pleasure, and may accept donations of real and personal property for the benefit of the college hereafter to be established by them, and contributions of money or negotiable securities of every kind, in aid of the endowment of said college, and may confer degrees, etc."

Here is specific authority to accept real property for the benefit of the college. "Benefit" is a very broad word, and means, according to the lay dictionaries, "whatever promotes prosperity and personal happiness; advantage; profit; good; natural advantages; endow-

ment; pecuniary advantages or profit." Bouvier's Law Dictionary defines "benefit" as: "Profit; fruit; advantage." We submit there could be no possible question that under the language quoted above, full and complete authority is vested in the corporation to accept the property involved.

There is nothing else in the charter that would in the least affect the right above given to accept the property involved. The only other mention of the authority to acquire realty is in Section 4 of the charter, the language in this connection being as follows:

"\* \* \* The said corporation shall have the power to select any appropriate town, city, or other place in this state, at which to establish said college, and to purchase grounds, not to exceed one hundred acres, as a building site and campus therefor, and erect thereon such buildings, dormitories, and halls as they may think expedient and proper, to subserve the purposes of their organization, and the best interests of said institution, and they may invite propositions from any city or town, or individual in this state for such grounds, and may accept donations or grants of land for the site of said institution."

The above two quoted portions of the charter contain everything in it with reference to the acquisition of realty. Counsel contends that under these provisions the corporation can hold only one hundred acres of land, and that Section 4 is a limitation to that effect. It will be noted, however, that the only limitation is in the purchase of land for a campus. It is provided that the corporation, if it is forced to purchase land for a campus may not purchase but one hundred acres for this pur-

pose. The limitation on the amount of land which the corporation could purchase for a campus does not in any way affect the power given in Section 1 to accept donations of realty for its general benefit and in aid of its endowment. This is true for several reasons. In the first place, the acceptance of donations of real property for the benefit of the college and in aid of its endowment has nothing whatever to do with the grounds that the college may either accept or purchase for its site and campus. There is a clear distinction between a site and campus and grounds therefor, and the endowment fund of a college, and there is quite a distinction between a campus and site of a college and real property for its general benefit.

In *Eduards v. Hall*, 6 De Gex M. & G. Rep. 74, it is said:

"By the endowment of a school or hospital or chapel, it is commonly understood, not the building or purchase<sup>of</sup> a site for a school or hospital or chapel, but the providing of a fixed revenue for the support of those institutions."

To the same effect is Bouvier's Law Dictionary, defining the word "endowment"; and to the same effect is *State v. Lyon*, 32 N. J. Law, 360.

So, therefore, it cannot reasonably be said that in giving the right to purchase or to accept grounds for a site and campus for a college the Legislature intended to change or to limit the general right already given in Section 1 to accept donations of real and personal property for the benefit, etc.

In the second place, in no sort of event could the language of the above quoted Section 4 of the charter be taken as anything more than carving an exception out of the general power already given to accept donations of real property for the general benefit of the college. It could be nothing more than the carving of an exception from the general power already given only to the extent of the amount of land for a campus, thus leaving the college in full possession of the power already given to accept donations of real and personal property for the general benefit of the college. The rule is universal that where the enacting clause is general in its language, and a proviso is afterwards introduced, the proviso is strictly construed and takes no case out of the enacting clause which does not fall fairly within its terms. In other words, a proviso carves a special exception only out of the enacting clause.

Thus in *United States v. Dickson*, 15 Peters, 141, 10 Law Ed. 689, Justice Story, speaking for the court, said:

" \* \* \* We are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and object, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within the terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reasons thereof."

See also holding to the same effect, *Yale University v. New Haven*, 43 L. R. A. 497. If the court desires to see other cases on the same point it will find them in *Roses* notes, giving the cases where *United States v. Dickson*, *supra*, has been cited.

Counsel for the city says there was no reason why the Legislature should limit the college to the purchasing of one hundred acres for a campus, and at the same time give it the right to accept realty as part of its endowment fund and for the benefit of the college. We have already, under part one of this brief, adverted to this proposition, and there showed some of the reasons why the Legislature would do this very thing. We also showed that it was not an anomalous situation for a college to be limited in the number of acres it could hold for a campus, and at the same time be able to accept any amount of real property in aid of its endowment fund, and we cited cases to this effect.

Another argument which counsel for the city made below was that if the charter gives the right to accept donations of real property, such as the property here involved, then the college can finally own all the improved real property in Jackson and the State of Mississippi, and hold it exempt. Of course this is not true, because the exemption section in the charter specifically says that the exemption shall be allowed only "so long as the said college shall be kept open and maintained for the purposes contemplated by this act, and no longer." It is clear from this that the college in no event could accept property of any kind, real or personal or mixed,

beyond what its needs might require to maintain the college for the purposes contemplated in the charter. Any property accepted beyond this would be an unlawful acceptance, and the state, through its proper officers, could interfere. To argue, therefore, about large holdings is begging the question. It is not conceivable by the wildest stretch of imagination that this college will ever expand to such an extent that its needs will require such a fund, even though it might all be given in real estate, to do the state or any one any damage.

We respectfully refer counsel to *Washington University v. House*, 75 U. S. 439, in which this court said:

"It is urged that the corporation, as there is no limit to its right of acquisition, may acquire property beyond its legitimate wants, and in this way abuse the favor of the Legislature and, in the end, become dangerous, on account of its wealth and influence. It would seem that this apprehension is more imaginary than real for the security against this course of action is to be found in the nature of the object for which the corporation was created. It was created specially to promote the endowment of a seminary of learning, and it is not to be presumed that it will ever act in such a manner as to jeopardize its corporate rights; nor can there be any well grounded fear that it will absorb, in its effort to establish a literary institution of a high order of merit, in the City of St. Louis, any more property than is necessary to accomplish that object, should a state of case in the future arise, showing that the corporation has pursued a different line of conduct, it will be time enough then to determine the rights of the parties to this contract, under this altered condition of things. The present record presents no such question, and we have no right to anticipate that it will ever occur. It is enough for



the purposes of this suit to say, that so long as the corporation uses its property to support the educational establishments for which it was organized, it does not forfeit its right not to be taxed under the contract which the state made with it."

Therefore, the college is authorized to hold the property involved.

Respectfully submitted,

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## APPENDIX "A."

List of special charters of educational institutions passed by the Legislature of Mississippi, each granting a special exemption of the institution's property from taxation, all enacted after the Constitution of 1869 became operative and before the Constitution of 1890 was enacted.

These statutes show the contemporary construction of the Constitution of 1869 by the legislative and executive departments of the state from its enactment until it ceased to be operative.

Whitworth College, exempt from taxation, Laws 1870, page 380, Sec. 4.

Choctaw Collegiate Institute, exempt Laws 1870, page 401, Sec. 3.

University of Columbus, exempt Laws 1873, page 438, Sec. 2.

Baldwyn Female College, exempt by adoption of the charter of Whitworth College, Laws 1873, page 435, Sec. 2.

Educational Society of South Mississippi and East Louisiana, exempt, Laws 1873, page 429, Sec. 9.

Southwestern Presbyterian University, exempt, Laws 1874, page 255, Sec. 1.

Abbeville Female College, exempt, Laws 1874, page 157, Sec. 4.

Lee Female College, exempt, Laws 1880, page 291, Sec. 8.

Blue Mountain Academy, exempt, Laws of 1882, Sec. 2.

Grenada Collegiate Institute, exempt, Laws 1884, page 881, Sec. 11.

- Loe Female College, exempt, Laws 1884, page 878, Sec. 3.  
 Pittsboro Male and Female College, exempt, Laws 1886, page 734, Sec. 3.  
 Port Gibson Female College, exempt, Laws 1886, page 634, Sec. 2.  
 Cooper Normal College, exempt, Laws 1886, page 726, Sec. 5.  
 Montrose High School, exempt, Laws 1888, page 635, Sec. 4.  
 Gulfport Dental College, exempt, Laws 1888, page 638, Sec. 3.  
 Mount Carmel Normal College, exempt, Laws 1888, page 639, Sec. 3.  
 Pickens High School, exempt, Laws 1890, page 561, Sec. 6.  
 Harper's Baptist College, exempt, Laws 1890, page 563, Sec. 2.  
 Pleasant High School, exempt, Laws 1890, page 569, Sec. 5.  
 Hebron High School, exempt, Laws 1890, page 570, Sec. 3.  
 Bellefontaine Male and Female High School, exempt, Laws 1890, page 574, Sec. 2.  
 Waynesboro Normal Institute & College, exempt, Laws 1890, page 581, Sec. 7.  
 Old Myrtle Normal College, exempt, Laws 1890, page 583, Sec. 3.  
 Millsaps College, exempt, Laws 1890, page 553, Sec. 5.

Note. The private and local laws passed in 1872 (Laws 1872, page 116, Sec. 10), were never published in book form, nor were the acts of a private nature passed in 1876 (Laws 1876, page 216), ever so published. No examination of the acts not so published has been made and the examination of the acts of other years from 1870 to 1890 has been only a casual one.



FORWARD

WILLIAMS COLLEGE, WILMINGTON, MASS.

1911

WILLIAMS COLLEGE, WILMINGTON, MASS.

WILLIAMS COLLEGE, WILMINGTON, MASS.

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**No. 228.**

# **In the Supreme Court of the United States**

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**OCTOBER TERM, 1925.**

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**MILLSAPS COLLEGE, PLAINTIFF IN ERROR,  
VS.  
CITY OF JACKSON.**

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**REPLY BRIEF FOR PLAINTIFF IN ERROR.**

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## **I.**

### **Jurisdiction.**

Defendant in error contends this court has no jurisdiction because it claims the general statutory revenue laws, in so far as they relate to exemption to colleges, are concerned, were the same when this charter was granted to the college as they were when the taxes in this case were imposed; in other words, that Section 468 of the Code of 1880, in so far as taxation of colleges is concerned, is the same as Section 4251, Code of 1906, and that there was no subsequent statute passed impairing the obligation of the charter contract. We think defendant in

error is absolutely wrong in this and that a slight comparison of the two statutes will show this to be the case. In order that this court may have the benefit of the context we quote the two laws in full, italicizing pertinent portions.

Chapter 10 of the Code of 1880 is entitled "An Act in Relation to Public Revenue," and the first section thereof, being Section 468 and headed "What Property Exempt," is as follows:

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 "The following property *and no other* shall be exempt from taxation, to-wit: All cemeteries used exclusively for burial purposes; property, real or personal, belonging to the United States or to this state or to any county, incorporated city or town within the state, or to any religious society *or incorporated institution for the education of youth, used exclusively for the benefit and support of such society or institution*, or held and occupied by the trustees of schools and school lands of the respective township for the use of public schools; or property appropriated to and occupied and used for any courthouse, jail, houses of correction, poor houses, hospitals or charitable institutions; wearing apparel, not including jewelry or watches; provisions on hand necessary for family consumption or farming produce raised in this state in the hands of the producer; all dogs, except where the Board of Supervisors shall impose a tax thereon for county purposes; one gun kept for private use, all poultry household furniture, not to exceed in value two hundred fifty dollars; two cows and calves; ten head of hogs; ten head of sheep or goats, colts foaled in this state under three years old; farming utensils used for agricultural purposes; all property of agricultural and mechanical association and fairs, used for promoting their objects; the tools of any mechanic

necessary for carrying on a trade; the libraries of all persons, pictures or works of art, not kept or offered for sale as merchandise."

Then follows other sections relating to the public revenue.

Chapter 122 of the Code of 1906, is the revenue chapter. Section 4251 being the first section thereof, and headed "What Property Exempt," is as follows:

"The following property, *and no other*, shall be exempt from taxation, to-wit:

(a) All cemeteries used exclusively for burial purposes;

(b) All property, real or personal, belonging to the United States;

(c) All property, real or personal, belonging to this state, or to any county, levee board or municipal corporation thereof;

(d) All property, real or personal, belonging to any religious or charitable society, and used exclusively for the purpose of such society and not for profit. *All property, real or personal, belonging to any college or institution for the education of youth, used directly and exclusively for such purpose.*

(e) All property, real or personal, held and occupied by the trustees of schools, and school-lands of the respective townships, for the use of public schools;

(f) Property appropriated to and occupied and used for any hospital or charitable institution;

(g) Wearing apparel of every person, not including jewelry or watches;

(h) Provisions on hand necessary for family consumption;

(i) All farm products, raised in this state, in the hands of the producer;

(j) One gun for each owner, kept for private use;

(k) All poultry;

(l) Household furniture, not to exceed two hundred and fifty dollars in value;

(m) Two cows and calves;

(n) Twenty head of sheep and goats each;

(o) All colts foaled in this state, under three years old;

(p) Farming implements used for agricultural purposes;

(q) All property of agricultural and mechanical associations and of fairs used for promoting their objects;

(r) The libraries of all persons;

(s) All pictures and works of art not kept or offered for sale as merchandise;

(t) The tools of any mechanic necessary for carrying on his trade;

(u) Ten head of hogs."

The above italicized words "and no other" had the effect, of course, of repealing all prior repealable exemptions not enumerated in the section just above quoted.

We submit that the italicized portion in the first section quoted above would exempt the property involved if it had been in force at the time these taxes were imposed, for the property involved herein is certainly used for the benefit and support of the college. Under Section 4251, Code of 1906, the property involved is not exempt because it is not used directly and exclusively for the purposes of the college, which would mean an actual occupation. Therefore,

Section 4251, having been passed subsequently to this charter and effect having been given to it to impose taxes on the property involved contrary to the exemption granted in the charter, impairs the obligation of the contract and gives this court jurisdiction.

We do not see how there can be any ground for controversy on the above proposition. The exemption to the college having been given when the prior statute was in force would also make it clear, if it were not already clear on the face of the charter itself, that the legislature intended to give to the college equally as much exemption as was allowed at the time by the general statute, especially in view of what the college was agreeing to do in Section 6 of the charter.

**Judgment for costs not appealable to this court, therefore is not necessary to join the sureties in this writ of error.**

Defendant in error makes the point that we should have joined Lampton and Buie, sureties for costs on the appeal from the circuit court to the state supreme court, in this writ of error. By reference to the judgment of the circuit court (R. 11) the court will see that there was no judgment whatsoever entered against the college for money but only denied the motion to strike the assessment. By reference to the judgment of the state supreme court (R. 14) it will be seen that it was only an affirmance of the judgment of the lower court and a judgment against the college and Buie and Lampton sureties, for the costs of the cause.

The cases cited by defendant in error are not applicable to cases of this kind. Judgments for costs are not appealable.

*Glendale Elastic Fabric Company v. Smith*,  
100 U. S. 112; 25 L. Ed. 547.

*Russell v. Farley*, 105 U. S. 437; 26 L. Ed.  
1061.

*Burns v. Rosenstein*, 135 U. S. 456, 34 L. Ed.  
195; 10 Sup. Ct. Rep. 817.

## II.

**Charter not subject to repeal or modification as contended by defendant in error on account of any statutory regulations.**

On page 114 of their brief, counsel quote from page 292 of the Code of 1857 as follows:

"All charters granted under this act or by any act of the legislature, unless otherwise expressly repealed in the act, may be repealed by the legislature."

This provision must have been repealed pretty shortly thereafter because charters granted during the sixties and seventies were held unrepealable by our courts, but it was certainly repealed by the Code of 1880 and did not come back into our law until the present constitution was adopted, which was after the granting of this charter. Section 1031 of Chapter 38 of the Code of 1880 entitled "An Act in Relation to Corporations and other Associations" is as follows:

"Every corporation created under this act and all others not otherwise provided for, shall

have succession for the time limited in the charter and if no time be limited, then perpetual succession."

Sections 2 and 3 of Chapter 1 of said Code of 1880 are respectively as follows:

Section 2: "The said acts, except as expressly provided for, shall take effect on the 1st day of November, 1880, and from that day this code shall be received in use and shall supercede all prior statutes and clauses therein revised and hereby repealed."

Section 3: "From and after the said 1st day of November, 1880, all acts and parts of acts, the subjects whereof are revised, consolidated and reenacted in this revised code or repugnant to the provisions contained therein, shall be and the same are hereby repealed, subject, however, to any express regulations relating thereto which may be contained in this code."

In 1884 the Gulf and Ship Island Railroad Company, by its charter, was granted the right to charge very high freight and passenger rates. After this road became successful, the state tried to take these rights away, but the Supreme Court of Mississippi held it could not do so as it would be an impairment of an obligation of a contract.

*Mississippi Railroad Commission v. Gulf and Ship Island Railroad Company*, 78 Miss. 571; 90 Miss. 561.

**No provision in character subjecting it to repeal or modification.**

Defendant in error contends that the words, "and do and perform all other acts for the benefit of said

institution and the promotion of its welfare that are not repugnant to the constitution and laws of this state or of the United States," following the specified and enumerated powers in Section 1 of the charter, subjects it to modification or repeal by subsequent laws. It is quite apparent, however, that this general language following the enumerated powers, are words of enlargement and not of limitation. Their purpose is to give to the college, in addition to and besides the specified and enumerated powers, such other powers as might not conflict with laws of the state or of the United States. The enumerated powers stand, regardless of any other laws that may be in conflict with them.

### III.

**The college has power to hold the property involved.**

Defendant in error contends that the college illegally holds the property involved. A full and complete answer to this contention is the fact that the charter unequivocally grants to the college the power and right to accept and own the property.

The statutes regulating the owning of real property by religious societies have no application at all to this college. Millsaps College is an educational corporation with visitorial powers vested in the Methodist Church, but this does not make it a religious society or corporation. The exact question was at issue in a Missouri case in *State v. Westminster College* and reported in 74 Southwestern Reporter at page 900. This was a case in which the college was claiming an exemption



from taxation and the state attacked the claim. The college was owned, controlled and managed by the Presbyterian Church, just as in this case this college is controlled and managed by the Methodist Church. The constitution of the State of Missouri forbade the establishment of religious corporations, and for this reason the state claimed it could not hold property at all, and therefore, could not hold it exempt.

The court said in part,

"A corporation established for purely academic purposes, for education in literature and in the arts and sciences, is in no sense a religious corporation even though it be given into the care and under the management of a religious body."

The point that religious societies could not own real property and therefore could not claim exemptions from taxation was raised in the case of *Adams County v. Catholic Diocese of Natchez*, 110 Miss. 366, and the Supreme Court of Mississippi held the property to be exempt. The Catholic Diocese of Natchez was a corporation and owned certain property in the City of Natchez which it rented out and used the revenue for charitable purposes.

Later the supreme court held in the Baptist Church case, *Gunter v. City of Jackson*, 130 Miss. 637, that, as religious societies were forbidden by the statutes to own property for revenue purposes, the Baptist Church could not hold the Harding Building in the City of Jackson, which was owned by Gunter as trustee for merely an unincorporated association of Baptists. This point was raised by brief of counsel in the Catholic

Diocese case, and while it is not mentioned in the opinion of the court in the Natchez case, the distinction must have been that it was a corporation that owned the property in Natchez and not a mere association.

But regardless of all else, the holding of this building by Millsaps College was made legal by Chapter 194 of the Laws of the Legislature of Mississippi of 1926. Section 2 of said chapter headed "Titles Validated," is as follows:

Section 2: "That the title to all real property now owned by any religious society, ecclesiastical body and for any congregation thereof, be and the same is hereby validated, and such society, body or congregation is authorized and empowered to continue to own the same or to convey or encumber the same."

No representative of Millsaps College took any part in securing the passage of this act, but its passage was mainly secured by the Baptists whose holding of the Harding Building had recently been condemned by the supreme court in the above case.

#### IV.

**Millsaps College in owning and renting out this property is not engaged in a business in competition with other businesses.**

Defendant in error contends that one reason this property should be taxed is that it is operated in competition. The cases he cites on this point, however, all deal with commercial businesses such as operating mercantile establishments, as was the case in *Gunter v. City of Jackson*, in which the Baptists of the state

operated a bookstore (there are two of these Baptist Church cases, one dealing with the Harding Building and the other with a book store, both decided the same day). It would not make any difference in this case even if the contention were true, but it just happens that it is not true and, as so much is made of the contention, we simply call attention to it. The owning and renting of an office building for revenue as an incident to an enterprise, whether the operation of ~~the~~ <sup>a</sup> college or some commercial business, is not a business and therefore when competition in business is spoken of, such owning and renting is not in mind.

Vanderbilt University owned and rented out for revenue, which it used to run the school, two buildings in the City of Nashville, one of these was a large apartment house and the other a large office building. Under the law of Tennessee there was exempt from taxation all property belonging to an educational institution when used exclusively for the purposes for which said institution was created, except such property owned by such institution as is used in secular business competing with a like business that pays taxes to the state. In the case of *Vanderbilt University v. Cheney*, 116 Tenn. 259, 94 S. W. 90, the Supreme Court of Tennessee held that the two buildings mentioned above, when the revenue derived was used in the operation of the school, were used exclusively for the purpose for which the university was created, and the owning and renting of an apartment house and office building is not a business in competition with other businesses, though it appeared there were many such buildings owned and rented by other persons in the City of Nashville.

## V.

**The rule that a construction by state court of state's statutes will not be reversed by this court unless manifestly wrong, does not imply that this court will not exercise its independent judgment.**

The agreed statement of facts (R. 1 and 2), by which we respectfully submit the state court was precluded from placing its decision on the ground it did, specifically stipulates that the property involved is a part of the endowment fund of the college, thereby bringing it directly within the exemption granted in the charter. In view of this fact it would hardly be consistent for counsel for defendant in error to urge that the property does not come within the language of the exemption, and indeed they do not seriously do so. They depend, so far as this part of the case is concerned, largely on the fact that this court has great respect for the opinion of the state courts when construing their own statutes, and will not reverse unless manifestly wrong. However, in our judgment, counsel put too much dependence on this rule. The rule does not imply that this court will not exercise its independent judgment and does not imply that this court will let the opinion of the state court itself create a doubt. It does not mean that because the state court has decided against the contract right in this case, that there is, therefore, a doubt and hence the duty of this court to affirm. If this were true, the power of this court to review the action of the state court in this and similar cases would not actually exist and the taking of jurisdiction would be a mere futility. The real meaning of

the rule is that if, after giving due consideration to the issues involved, this court, in the exercise of its independent judgment, remains in substantial doubt, the decisions of the state court will be affirmed.

This court had no difficulty in finding that the state courts were wrong in the cases of *Home of Friendless v. Rouse*, 75 U. S. 430, 19 L. Ed. 495; *Washington University v. Rouse*, 75 U. S. 439, 19 L. Ed. 498; *St. Anna's Asylum v. City of New Orleans*, 105 U. S. 362, 26 L. Ed. 1128; *Northwestern University v. Peeple*, 99 U. S. 308, 25 L. Ed. 387.

The opinion of the Supreme Court of the State of Mississippi in this case is manifestly wrong and we think this court will have no difficulty in finding it so.

## VI.

We will not undertake to make reply to the many trivial questions raised by the defendant in error. Indeed, but for the error made on page 114 of its brief in quoting from the Code of 1857 to show that this charter was repealable, no reply would have been necessary. But since it was necessary to correct that mistake we thought we might as well make clearer the points herein discussed.

We regret that the writer's continued illness will prevent an oral argument on behalf of the college. On this account, counsel for the City of Jackson have very generously agreed not to orally argue the case. We make this statement so the court may know that it is not lack of interest in the case that there will be no appearance for argument. However, the briefs on both

sides are very comprehensive and will give as much aid to the court as would an oral argument.

We submit that this case should be reversed and, as every conceivable point has been raised by the city, we respectfully ask that judgment be entered here for the college.

Respectfully submitted,

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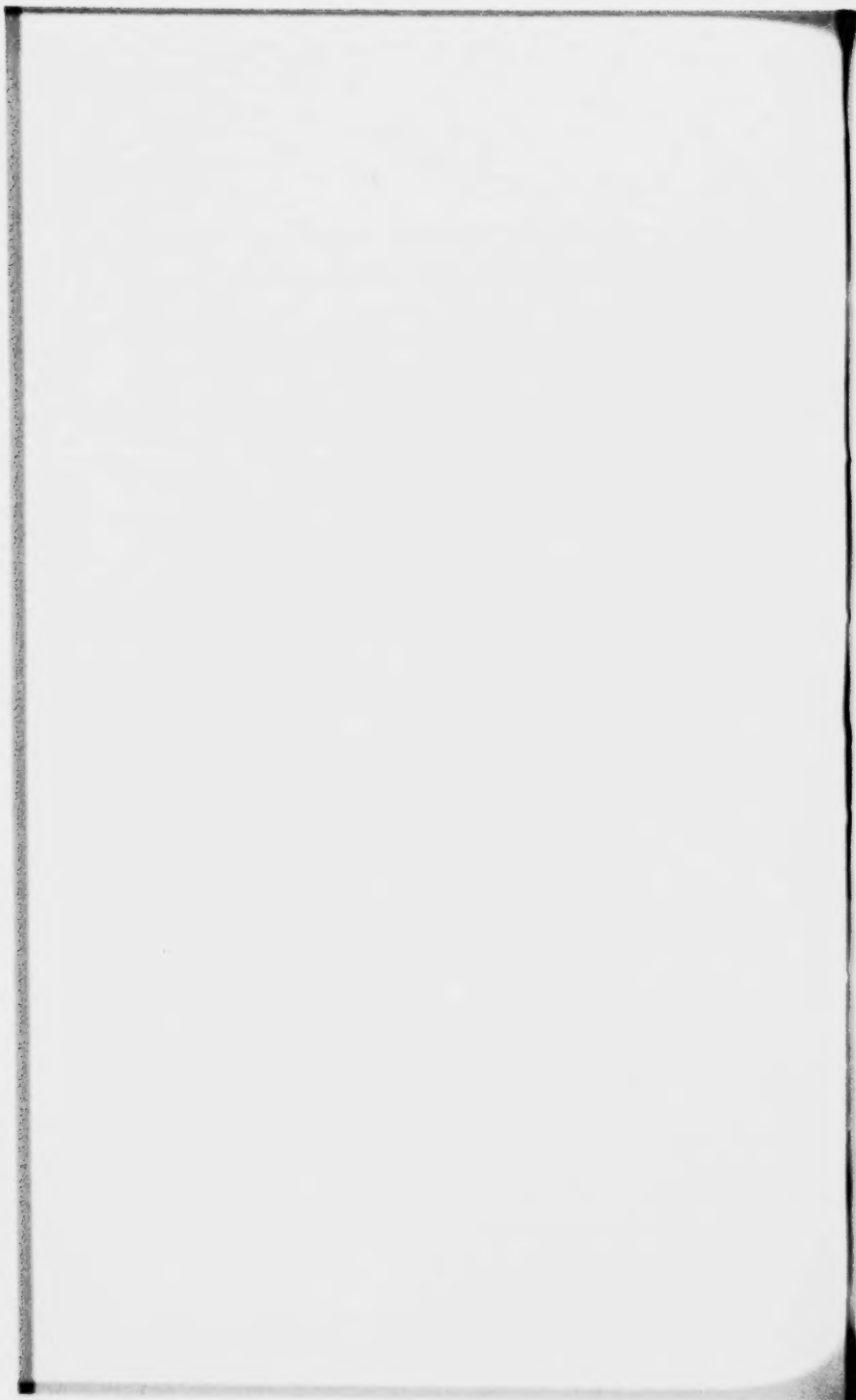
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IN THE  
**Supreme Court of the United States**

MILLSAPS COLLEGE, PLAINTIFF IN ERROR

V.

CITY OF JACKSON, DEFENDANT IN ERROR

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No. 225.

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October Term, 1925.

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BRIEF FOR DEFENDANT IN ERROR.

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**Preliminary Statement.**

The Legislature passed a special act on February 21st, 1890, incorporating Millsaps College, (herein called "College"), Plaintiff in Error, (Tr., 3), the College was located at Jackson.

Upon June 27, 1908, and again upon March 24, 1913, R. W. Millsaps undertook to convey to the College office buildings in Jackson, reserving to himself a life estate (Tr. 5, 6), as a part of the "endowment."

Major Millsaps paid all taxes on them until his death, June 29, 1916, they have been regularly assessed and paid ~~on~~ since his death.

On September 13, 1923, the College filed with the taxing authorities of Jackson, a municipal corporation, (whose charter powers nowhere herein appear) an application to strike the

assessment of these office buildings from the tax rolls, upon the ground "Under Section 5 of the charter of said College, (they are) exempt from all State, county and municipal taxes," asked relief, was denied without any reason assigned.

Section V reads:

"That the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college, and the buildings, halls, dormitories thereon erected, and the endowment fund, contributed to said college, shall be exempt from all State, county and municipal taxation, so long as the said college shall be kept open and be maintained for the purposes contemplated by this act, and no longer."

The sole act alleged to impair, is Section 4251 Code of Mississippi 1906, which provides:

"The following property, and no other, shall be exempt from taxation, to-wit: \* \* \*

"(d) All property, real or personal, belonging to any religious, or charitable society, and used exclusively for the purpose of such society and not for profit. All property, real or personal, belonging to any college or institution for the education of youth, used directly and exclusively for such purpose."

### **COURT PROCEEDINGS**

An appeal was had to the Circuit Court of Hinds County, wherein the cause was tried *do novo*, substantially, upon a demurrer to the petition. The Circuit Judge held:

(a) The charter exemption (Section 5) violated Sections 13 and 20 of the Mississippi Constitution of 1892.

(b) That the College had no exemption of these office buildings under its charter, but that

(c) If it had such an exemption, it was, nevertheless repealable and repealed by Section 4251. (This is the sole reference thereto in the record).

Upon appeal the Supreme Court, after stating the facts, among other things, said:

"The record and briefs of counsel present several interesting and difficult questions for decision, but there is one which lies at the threshold of the case, which must be decided in favor of the College before the other questions can properly be reached, and is, Does the exemption granted by Section V of the Charter of the College cover land of the ~~charter~~ <sup>College</sup> of that here in question?" (Tr. 15). Then, after treating this question of construction purely, properly announced:

"It follows from the foregoing views that we are of the opinion that the exemption of land from taxation granted the appellant by Section V of its charter is restricted to "the lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college, and the buildings, halls, and dormitories thereon erected." (Tr. 16) 101 So., 574; 136 Miss., 795, printed as App. "A" hereto.

A suggestion of error was filed (Tr. 17, 22) wherein the College raised **none other than questions of interpretation**, and made no reference whatsoever to constitutional objections, this was overruled. (Tr. 22) The case is here on writ of Error.

### POINTS.

POINT 1. This Court is without jurisdiction and the Writ of Error should be dismissed because the decision of the Supreme Court of Mississippi is merely interpretive of Section V. (Its validity conceded), and did not give effect to any subsequent statute of the State of Mississippi di-

rectly or indirectly. Therefore, no contract right, legislatively, impaired. **New Orleans Water Works Co. v. Sugar Refining Co.**, 125 U. S., 18. **Henderson Bridge Co. v. Henderson**, 141 U. S., 697. **St. Paul, Minnesota & Manitoba R. R. Co. v. Todd**, 142 U. S., 289. **Central Land Co. v. Laidley**, 159 U. S., 110. **Bacon v. State**, 163 U. S., 207. **G. & S. I. R. R. Co. v. Hewes**, 183 U. S., 66. **Fisher v. New Orleans**, 218 U. S., 438. **Cross Lake Shooting Club v. Louisiana**, 224 U. S., 632. **Ross v. Oregon**, 227 U. S., 150. **Roker v. Federal Trust Co.**, 261 U. S., 114. **Columbia Railway Co. v. South Carolina**, 261 U. S., 244. **Fleming v. Fleming**, 264 U. S., 29. **Tidal Oil Co. v. Flanagan**, 263 U. S., 444. **Western Union Tel. Co., v. Georgia**, Adv. Sheets, Dec. 1, 1925,..... U. S. ...., 70 L. Ed. 76. **Huntington v. Attrill**, 140 U. S., 637. Case distinguished and distinguishable, see **Y. & M. V. R. R. v. Thomas**, 132 U. S., 174. **Wilmington, etc., v. Alsbrook**, 146 U. S., 279. **McCullough, v. Virginia**, 172 U. S., 102. **M. & O. R. R. Co., v. Tennessee**, 153 U. S., 486. **New Orleans Water Works v. Louisiana Refining**, 125 U. S., 18. **Jefferson Branch Bank v. Kelly**, 1 Black, 436. **Y & M V R R Co., v. Adams**, 180 U. S., 46. **Northwestern University v. People**, 99 U. S., 309. **St. Anna's Asylum v. New Orleans**, 105 U. S., 362. **Home of the Friendless v. Rouse**, 8 Wall, 430. **Washington University, v. Rouse**, 8 Wall, 439. **Louisiana Railway Navigation Co., v. Behrman**, 235 U. S., 164.

POINT 2 The Act alleged to impair Section 4251 not available under the Federal Constitution because:

- (a) Its operation expressly excluded from private acts by the Code. **Adams v. R. R. Co.** 77 Miss., 608.
- (b) It antedates the alleged contract and has been continuously in force from such anterior date. Code 1857, p. 73, Art. 11, Code 1871 Section 1662, Code 1880, Section 168. **Levy Leasing Co. v. Seigel**, 254 U. S., 218. Code

1880, Section 1072; **Water Works Co. v. Oskosh**, 187 U. S., 446; **R. R. Co. v. McClure**, 10 Wall. 512; **Lehigh Water Co. v. Corporation**, 121 U. S. 388; **Pinney v. Neilson**, 183 U. S., 147.

(c) Under admission of counsel, Section 4251 immunizing realty from taxation is as broad as the exemption in Section 5. **Oddfellows v. Redus**, 78 Miss., 352; Code 1880, Section 468; Code 1906, Section 4251.

(d) Section 4251 merely codification of existing law. Code 1857, p. 73; Code 1871, Section 1662; Code 1880, Section 468; Code 1892, Section 3744; **Levy v. Leasing Co.**, 358 U. S., 348.

(e) The act alleged to impair Section 4251 not available under the Federal Constitution, because Section 1 not such a contract as may be legislatively impaired. **Pennsylvania College Cases**, 13 Wall., 214.

POINT 3. This charter being a local act, expressly integrates right of Mississippi to legislate; to condition all that was to be thereunder, upon coordination with Constitution and statutes of Mississippi, prohibiting land ownership; such acquisition being illegal, exemption not operative. **Dartmouth College Case**, 4 Wheat., 712; **Pennsylvania College Cases**, 13 Wall., 214.

POINT 4. Requisite parties omitted from Writ of Error. **Mason v. United States**, 136 U. S., 481; **Hardee v. Wilson**, 146 U. S., 181; **Estes v. Trabue**, 128 U. S., 230.

POINT 5. The Supreme Court of the State of Mississippi correctly construed the charter of the plaintiff in error. **Chicago Theological Seminary v. Illinois**, 188 U. S., 632.

(a) The construction of this local statute, even though a

charter announced by the State Supreme Court, should be adopted unless manifestly wrong. **Edward Hines Yellow Pine Trustees v. Martin**, U. S. Adv. Sheets, 1925, 604, **Chicago Theological Seminary v. Illinois**, 188 U. S., 632, **Jetton v. University of the South**, 208 U. S. 489.

- (b) The right to an exemption from taxation must be manifest, clear and unambiguous and every doubt must be resolved in favor of the right of taxation. **Vicksburg, Shreveport R. R. Co. v. Dennis**, 116 U. S., 665, **Wilmington, etc., v. Alsbrook**, 146 U. S., 279, **New York v. Board**, 199 U. S., 1, **Chicago Theological Seminary v. Illinois**, 188 U. S., 662, **Berryman v. Board of Trustees**, 222 U. S. 334, **Y. & M. V. R. R. Co. v. Thomas**, 132 U. S., 185.
- (c) The charter analyzed and construed independently of the State Supreme Court's decision. **Y. & M. V. R. R. Co. v. Adams**, 180 U. S., 22, **State v. Bishop Seabury Mission**, 90 Minn., 92, **Appeal of Wagner**, 11 Art. 403, **State v. Lynn**, 42 N. J. L., 400, **State v. Crollman**, 38 N. J. L. 313, **Rosedale Assn. v. Linden**, 63 Atl., 904, **Life Assn. v. Schilling**, 120 Pas., 548, **New London v. Colby**, 46 Atl., 743, **McCulloch v. Stone**, 64 Miss., 378, **M. E. Church v. Meridian**, 89 So. 650, 126 Miss. 78, **Gunter v. City of Jackson**, 94 So. 842, 120 M. 637, **Columbia Ry. Co. v. South Carolina**, 261 U. S., 236, **Chicago Theog. Seminary v. Illinois**, 188 U. S., 662, **Y. & M. V. R. R. Co. v. Adams**, 180 U. S. 22.
- (d) Land Ownership may be regulated. **Terrace v. Thompson**, 263 U. S., 217, **In Re McGraw**, 32 L. R. A. 387.
- (e) Repeal of Unexercised Powers, not unconstitutional. **Pearsall v. Great Northern R. R. Co.**, 161 U. S., 646.
- (f) Construction of State Supreme Court correct and in accordance with the policy of the State.

POINT 6. Under Sections 13 and 20, Article XII, Constitution 1869 no irrevocable exemption of property. **Attala County v. Kelly**, 68 Miss., 44; **Mississippi Mills v. Cook**, 56 Miss., 40; **Adams v. R. R. Co.**, 77 Miss., 287; **Daily v. Swope**, 47 Miss., 367; **Vassar v. George**, 47 Miss., 413; **Gaines v. Coats**, 51 Miss., 338; **Holberg v. Macon**, 55 Miss., 114; **Cross v. Burke**, 146 U. S., 86; **State v. Simmons**, 70 Miss., 485; **Washington University v. Rouss**, 42 Md., 326; **Monday v. Van Hoose**, 30 S. E., 585; **State v. New Brunswick**, 35 Atl., 853; **State v. Assessors**, 26 So., 876; **Tucker v. Ferguson**, 22 Wall., 575; **Jackson v. Mississippi Fire Insurance Co.**, 95 So., 848; **Adams v. Tombigbee Mills**, 78 Miss., 677; **Insurance Co. v. French**, 109 Iowa, 585; **St. Louis, etc. R. R. Co. v. Burg**, 113, U. S., 475; **R. R. Co. v. Palmes**, 109 U. S., 244; **Keokuk, etc. R. R. Co. v. Missouri**, 152 U. S., 310; **Y. & M. V. R. R. Co. v. Vicksburg**, 209 U. S., 362; **Adams v. Bullock**, 94 Miss., 32; **Vicksburg Bank v. Worrell**, 67 Miss., 47; **Murray v. Lehman**, 61 Miss., 243; **Board of Trustees v. County**, 136 N. W., 619; **Baltimore v. Maryland**, 67 Atl., 261; **Adams v. Bank**, 78 Miss., 536; **Y. & M. V. R. R. Co. v. Adams**, 81 Miss., 90.

### ARGUMENT.

POINT 1. THIS COURT IS WITHOUT JURISDICTION AND THE WRIT OF ERROR SHOULD BE DISMISSED BECAUSE THE DECISION OF THE SUPREME COURT OF MISSISSIPPI IS MERELY INTERPRETIVE OF SECTION V. (ITS VALIDITY CONCEDED), AND DID NOT GIVE EFFECT TO ANY SUBSEQUENT STATUTE OF THE STATE OF MISSISSIPPI DIRECTLY OR INDIRECTLY. THEREFORE, NO CONTRACT RIGHT, LEGISLATIVELY, IMPAIRED.

Very properly the College raised the question of jurisdiction. It is fundamental, decisive.

While we shall endeavor to maintain the correctness of the decision of the State Supreme Court, it is necessary not only for the plaintiff in error to establish an erroneous construction of the charter, but that in addition thereto, the State Supreme Court must have given effect to some subsequently enacted statute therein.

As said in **Edward Hines Yellow Pine Trustees v. Martin**, U. S. Adv. Sheets (all references are to Law. Coop. only 1925, 604

"Both the meaning of statutes of a state and the rules of the unwritten law of a state affecting property within the State are peculiarly questions of local law, to be ascertained and established by the State Courts. For that reason Federal Courts ordinarily hold themselves bound by the interpretation of State statute by the State Courts."

The Supreme Court of Mississippi merely interpreted Section V, and in interpreting, held it not to embrace this character of lands, occupied away from the College, as office building, rented for hire. The Court expressly said

"There is one (question) which lies at the threshold and deciding that question alone, determined V immunized only

"The lands or grounds, not to exceed one hundred acres, used by the corporation as a site and campus for said college and buildings, halls and dormitories thereon erected," but did exempt those thus used

The makers of the Constitution intended to prohibit States, through their legislatures, from impairing the obligation of a contract, nothing more. **Tidal Oil Co. v. Flanagan** 263 U. S. 444, 68 L. Ed 382



**New Orleans Water Works Co. v. Sugar Refining Co.**, 125 U. S., 18, 31 L. Ed. 607, is directly in point, wherein it is said:

"This being a writ of error to the highest court of a State, a federal question must have been decided by that Court against the plaintiff in error; else this Court has no jurisdiction to review the judgment. As was said by Mr. Justice Story, fifty years ago, upon a full review of the earlier decisions: 'It is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment,' and 'it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the State Court to the case.' *Crowell v. Randell*, 35 U. S., 10 Pet. 368, 398 (9 458, 470). The rule so laid down has been often affirmed, and constantly acted on. *Grand Gulf R. Co. v. Marshall*, 53 U. S. 12 How 165, 167 (13 938, 939); *Bridge Proprietors v. Hoboken Co.*, 68 U. S., 1 Wall 116, 143 (17 571, 576); *Steines v. Franklin County*, 81 U. S., 14 Wall 15, 21 (20 846, 848). In *Klinger v. Missouri*, 80 U. S. 13 Wall 257, 263, (20 635, 637), Mr. Justice Bradley declared the rule to be well settled that 'Where it appears by the record that the judgment of the State Court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this Court will not take jurisdiction of the case, even though it might think the position of the State Court an unsound one.' And in many recent cases, under Section 709 of the Revised Statutes, this Court, speaking by the Chief Justice,

has reasserted the rule that to give it jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that **'its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.'** *Brown v. Atwell*, 92 U. S. 327 (23 511); *Citizens Bank v. Board of Liquidation*, 98 U. S. 140 (25 114); *Chouteau v. Gibson*, 111 U. S. 200 (28 400); *Adams County v. Burlington & M. R. Co.*, 112 U. S. 123 (28 678); *Detroit City R. Co. v. Guthard*, 114 U. S. 133 (29 118).

"In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

"This court, therefore, has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative Act of the State has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this Court, delivered by Mr. Justice Miller. 'It must be the Constitution or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the state court must sustain the law or Constitution of the State, in the matter in which the conflict is supposed to exist, or the case for this court does not arise.' *Missouri & M. R. Co. v. Rock*, 71 U. S.

4 Wall. 177, 181 (18 381, 382.) "We are not authorized by the Judiciary Act to review the judgments of the State courts, because **their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts.** If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." **Knox v. Exchange Bank**, 70 U. S. 12 Wall. 379, 383, (20: 414, 415).

"As later decisions have shown, it is not strictly and literally true that a law of a State, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the Legislature in the ordinary courts of legislation, or in the form of a constitution established by the people of the State as their fundamental law."

"The distinction between the two classes of cases—those in which the State Court has, and those in which it has not, given effect to the statute drawn in question as impairing the obligation of a contract—as affecting the consideration by this Court, on writ of error, of the true construction and effect of the previous contract, is clearly brought out in **Kennebec & P. R. Co. v. Portland & K. R. Co.**, 81 U. S. 14 Wall. 23 (20 850). That was a writ of error to the Supreme Judicial Court of Maine, in which a foreclosure, under a Statute of 1857, of a railroad mortgage made in 1852, was contested upon the ground that it impaired the obligation of the contract, and the parties agreed that the opinion of the court should be considered as part of the record. Mr. Justice Miller in delivering judgment after stating that it did appear that the question whether the statute of 1857 impaired the obligation of the mortgage contract 'was discussed in the opinion of the court, and that the court was of the opinion

that the statute did not impair the obligation of the contract,' said: 'If this were all of the case, we should undoubtedly be bound in this <sup>Court</sup> ~~court~~ to inquire whether the Act of 1857 did, as construed by that court, impair the obligation of the contract. **Bridge Proprietors v. Hoboken Co.**, 68 U. S. 1 Wall. 116 (17 571). But a full examination of the opinion of the court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made, by the laws then in existence. Now, if the State Court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that we cannot inquire whether the Supreme Court of Maine was right in that opinion. Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the state court could rest, even if it had been in error as to the effect of the Act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the state court, we cannot take jurisdiction, because we could not reverse the case, though the federal question was decided erroneously in the court below against the plaintiff in error. **Rector v. Ashley**, 71 U. S. 6 Wall. 142 (18 733). **Klinger v. Missouri**, 80 U. S. 13 Wall. 257 (20 615). **Stenes v. Franklin County**, 81 U. S. 14 Wall. 15 (20 846). The writ of error must therefore be dismissed for want of jurisdiction. **Kennebec & P. R. Co. v. Portland & K. R. Co.**, 81 U. S. 14 Wall. 25, 26 (20 851).

The result of the authorities, applying to cases of contracts the settled rules, that in order to give this court jurisdiction of a writ of error to a state court, a federal

question must have been, expressly or in effect, decided by that court, and therefore, that when the record shows that a federal question and another question were presented to that court and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: **When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction.** When the existence and the construction of a contract are undisputed, and the state court upholds a subsequent law on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the state court holds that there was a contract conferring certain rights, this court has jurisdiction to consider the true construction of the supposed contract; and if it is of opinion that it did not confer the rights affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, it may on that ground affirm the judgment. So, when the state court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. **But when the state court gives no effect to the subsequent law, but decides on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction.**

"In the present case the Supreme Court of Louisiana did not, and the plaintiff in error does not pretend that it did, give any effect to the provision of the Constitution of 1879 abolishing monopolies. Its judgment was based wholly upon the **general law of the State**, and upon the construction and effect of the charter from the Legislature

to the plaintiff company, and of the license from the city council to the defendant company, **and in no degree upon the Constitution or any law of the State subsequent to the plaintiff's charter.** The case cannot be distinguished in principle from the cases above cited, in which writs of error to state courts have been dismissed for want of jurisdiction. As was said in **Bank of West Tennessee v. Citizens Bank of Louisiana**, 80 U. S. 13 Wall. 432 (20:514) above cited, "The result in this case would have been necessarily the same if the Constitution had not contained the provision in question." (Bold ours.)

The rule applicable is found in **St. Paul, Minneapolis & Manitoba Ry. Co. v. Todd**, 142 U. S. 282, 35 L. Ed. 1014. There the lands in question were assessed, in pursuance of Sections 1 and 6 of Chapter 11 of the General Statutes of Minnesota, and, as here stated, the Supreme Court of Minnesota

"Did not put this decision upon the ground that there was not a valid contract between the State and the company exempting its property from taxation, but held that the exemption claimed did not attach to these lands, and is argued that 'if such lands are within the contract of exemption contained in the company's charter, then the obligation of that contract was impaired by the assessment under Chapter 11 of the General Laws of the State and the decisions of the Supreme Court hold (ing) that the lands were subject to assessment under such laws.

"The position of the State was not that the lands in question were rendered taxable by any law passed subsequent to the company's charter, **but that under the terms of the contract itself the lands were taxable.** No subsequent law is referred to upon which the opinion of the court proceeded; on the contrary, **the law was the same, so far as any question arising here was concerned,** as that above quoted from the territorial law of 1851.

What the court held was that statutes imposing restrictions upon the taxing power of a State, except so far as they tend to secure uniformity and equality of assessment, are to be strictly construed (*Bank of Commerce v. Tennessee*, 104 U. S. 493 (26:810), and that tested by this rule the exemption in the company's charter **'was not applicable to large tracts of timber land purchased by the corporation from which to take timber to be converted into ties and lumber for the use of the corporation, and that consequently these lands were subject to taxation.'** It is impossible therefore for this writ of error to be sustained, and it is accordingly dismissed." (Bold ours).

This case is directly controlling.

The decision in the lower court is to be found in **County of Todd v. St. Paul, Minneapolis & Manitoba Ry. Co.**, 38 Minn. (1887-88) 163, thus:

"Taxation of Railway property—Timber lands not exempt. **The charter of a railroad corporation provided for the payment to the state of a stated percentage of its gross earnings, in lieu of all taxes and assessments, and that, in consideration of such payment, the company should be forever exempt from all assessments and taxes whatever upon its stock, franchise, or real estate, real, personal, or mixed. HELD, that such exemption was not applicable to large tracts of timber land purchased by the corporation, from which to take timber to be converted into ties and lumber for the use of the corporation.**" (Bold ours.)

In **Henderson Bridge Co. v. Henderson**, 141 U. S. 679, 35 L. Ed. 900, it is said

"The city of Henderson now makes a motion to dismiss the writ of error for want of jurisdiction in this

court, on the ground that no federal question was actually decided by the state court.

**"Although a federal question may have been raised in the state court, yet if the case was decided in that court on grounds not involving a federal question, but broad enough to sustain the decision, this court will refuse to entertain jurisdiction**

**"The opinion of the state court is based wholly upon the ground that the proper interpretation of the ordinance of February, 1882, was that the bridge company voluntarily agreed that the bridge should be liable to taxation. This does not involve a federal question, and is broad enough to dispose of the case, without reference to any federal question. This court cannot review the construction which was given to the ordinance as a contract, by the state court." (Held ours)**

See, also, **Missouri v. Harris**, 144 U. S. 210, 36 L. Ed. 409

**Central Land Co. v. Laidley**, 159 U. S. 110, 40 L. Ed. 24 is a leading case, wherein were reviewed all prior decisions. There, Mr. Justice Gray ruled

**"The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question, and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. As was said by this court, speaking by Mr. Justice Grier in such a case, as long ago as 1847, 'It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no**



part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary.' **Commercial Bank of Cincinnati v. Buckingham**, 46 U. S. 5 How. 317, 343 (12 181); **Lawler v. Walker**, 55 U. S. 14 How. 149, 154 (14 364, 366). • • •

"The same doctrine was stated by Mr. Justice Harlan, speaking for this court, as follows: 'The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases, would the judgment be reviewable by this Court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state Constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question.' **Lehigh Water Co. v. Easton**, 121 U. S. 388, 392 (30 1059, 1060)

In **Bacon v. State of Texas**, 163 U. S., 207; 41 L. Ed. 132, it appeared that in 1879 the State of Texas passed an act for the sale of public lands, providing that the purchaser should do and perform certain things, such as having the land surveyed, paying the purchase price of \$.50 per acre, etc. In 1883 an act was passed taking the unsold land off the market

Prior to the passage of the Act of 1883 plaintiffs in error claimed to have acquired a large tract of 300,000 acres. Suit was filed against them by the State of Texas, and in their answer plaintiffs in error set up their compliance with the Act of 1879, their acquirement of the title to the lands in question, and that the Act of 1883 was an impairment of their contractual rights.

The Supreme Court of Texas decided that the plaintiffs in error never acquired any title to the land in question, because of their failure to comply with the requirements of the act of 1879. A writ of error was taken to this Court, and the writ of error was dismissed on the ground that the State, in its decision, did not give effect to any subsequent legislative act.

The Court used the following language:

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the state which has been upheld or effect given it by the state court. *Lehigh Water Co., v. Easton*, 121 U. S., 388 (30 1059). *New Orleans Water Works Co., v. Louisiana Sugar Refining Co.*, 125 U. S., 18 (31 607). *Central Land Co., v. Laidley*, 159 U. S., 103 109 (40 L. Ed. 91 93). As stated in the case reported in 125 U. S. *supra*, it is not necessary that the law of a state, in order to come within this constitutional prohibition, should be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the state as their fundamental law. . . .

"If the judgment of the state court gives no effect to the subsequent law of the state, and dependent of that

law, a case is not made for review by this court upon any ground of the impairment of the contract." (Bold Ours)

This Court further held that although the decision of the State Court failed to give effect to its former decision no contract right was impaired in respect of which the Court used the following language:

"The argument involves the claim that jurisdiction exists in this court to review a judgment of a state court on writ of error when such jurisdiction is based upon an alleged impairment of a contract by reason of the alteration by a state court of a construction theretofore given by it to such contract or to a particular statute or series of statutes in existence when the contract was entered into. Such a foundation for our jurisdiction does not exist.

"It has been held that where a state court has decided in a series that its legislature had the power to permit municipalities to issue bonds to pay their subscriptions to railroad companies, and such bonds had been issued accordingly, if in such event suit were brought on the bonds in a United States court, that court would not follow the decision of the state court rendered after issuing of the bonds and holding that the legislature had no power to permit a municipality to issue them, and that they were therefore void. Such are the cases of **Gelpcke v. Dubuque**, 68 U. S. 1 Wall 175 (17 520) and **Douglass v. Pike County** 101 U. S. 677 (25 968). In cases of that nature there is room for the principle laid down that the construction of a statute and admission as to its validity made by the highest court of a state prior to the issuing of any obligations based upon the statute, enters into and forms a part of the contract and will be given effect to by this court as against a subsequent changing of decision by the state court by which such legislation might be held to be invalid. But effect is given to it by this court only on ap-

peal from a judgment of a United States court and not from that of a state court. This court has no jurisdiction to review a judgment of a state court made under precisely the same circumstances, although such state court thereby decided that the state legislation was void, which it had prior thereto held to be valid. It has no such jurisdiction, because of the absence of any legislation subsequent to the issuing of the bonds which had been given effect to by the state court. In other words, we have no jurisdiction, because a state court changes its views in regard to the proper construction of its state statute, although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract. When a case is brought in the United States court, comity generally requires of this court that in matters relating to the proper construction of the laws and Constitution of its own state, this court should follow the decisions of the state court; yet, in exceptional cases, such as *Gelpeke* and others, *supra*, it is seen that this court has refused to be bound by such rule, and has refused to follow the later decisions of the state court. A writ of error has been dismissed in this court **Mississippi & M. R. Co. v. McClure**, 77 U. S., 10 Wall, 311 (1908), where the judgment sought to be reviewed was that of a state court, holding "that certain bonds were void upon precisely the same facts that this court in the *Gelpeke* case held were valid. There was no subsequent legislative act impairing the obligation, and hence this court had no jurisdiction to review the judgment of the state court." (Held Ours.)

In the case of *Gulf & Ship Island Railroad Company vs. Hewes*, 183, U. S., 60, 46 L. Ed. 86, the Gulf & Ship Island R. R. Co., claimed a twenty year irrepealable exemption from taxation, under its charter of incorporation. In the State Court the Gulf & Ship Island Railroad Company procured an injunction restraining the Tax Collector from proceeding to

compel the payment of taxes claimed to be owing under the general statutory taxation laws of the State; and the plaintiff in error asserted its contractual exemption for a period of twenty years, and claimed that if it should be subjected to liability there would result an invasion of its constitutional rights against the impairment of the obligation of the contract.

The Supreme Court of the State of Mississippi, while it delivered no written opinion, seems to have held the exemption invalid, in respect of which this Court held on writ of error that it had no jurisdiction; that in so holding, the Supreme Court of the State of Mississippi was not giving effect to any subsequent statute. This Court used the following language, dismissing the writ of error:

"If no statute **could** impair it, it goes without saying that none **did** impair it. If, then, the decision of the Supreme Court, that the legislature had in fact repealed the exemption, was right, the railroad company cannot complain, since the legislature had done no more than it had a right to do. If, upon the other hand, we should be of opinion that the Supreme Court was wrong in holding the exemption repealed, such exemption would be abrogated, not by the act of 1892, but by an erroneous construction of that act. Our only authority to review the action of the state courts in this class of cases under Rev. Stat., Sec. 709, arises when the validity of a state **statute** is drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. Now, if the statute adjudged to be valid does not impair the obligation of any contract, it is not repugnant to the Constitution. It is the fact that the act, as construed by the Supreme Court, impairs the obligation of a contract that gives us jurisdiction, and if there be in the act of 1892 no contract that can be impaired by subsequent legislation, it is of no consequence that the

Supreme Court may have given it a wrong construction. "Before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired." **New Orleans v. New Orleans Waterworks Co.**, 142 U. S., 79, 88, 35 L. Ed. 943, 946, 12 Sup. Ct. Rep. 142. Indeed the whole foundation of our jurisdiction in this class of cases must rest upon a contract which cannot be legally impaired.

"This court has repeatedly held that we cannot revise the judgment of the highest court of a state unless, by its terms or necessary operation, it gives effect to some provision of a state Constitution or law, which as thus construed, impairs the obligation of a precedent contract. In **Mississippi & M. R. Co. v. Rock**, 4 Wall. 177, 181, 18 L. Ed. 381, 382, this court pronounced it a "fundamental error that this court can, as an appellate tribunal reverse the decision of a state court, because that court may hold a contract to be void which this court might hold to be valid." . . . To the same effect are **Lehigh Water Co. v. Easton**, 121 U. S., 388, 392, 30 L. Ed. 1059, 7 Sup. Ct. Rep. 916, and **New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.**, 125 U. S., 18, 30, 31, L. Ed. 607, 612, 8 Sup. Ct. Rep. 741. In the latter case it is said by Mr. Justice Gray: "In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the state and not at the decisions of its courts, or the acts of administrative or executive boards or of officers, or the doings of corporations or individuals." See also **Central Land Co. v. Laidley**, 159 U. S. 100, 109, 40 L. Ed. 91, 93, 16 Sup. Ct. Rep. 86.

In the case of **Fisher v. New Orleans**, 218 U. S., 438, 54 L. Ed., 1099, plaintiffs in error entered into a certain contract with the School Board of the City of New Orleans, and claiming that the School Board was indebted to them by reason thereof, which indebtedness it refused to discharge, filed a petition for mandamus to compel the levying of a special tax for the purpose of providing funds to discharge such indebtedness.

The Supreme Court of Louisiana denied the relief on the ground that the School Board of New Orleans had no authority to make the contract in question, therefore placing their decision on a question of state law not giving effect to any subsequent statute.

The court used the following language:

"The plaintiffs in error are met at the outset by a denial of the jurisdiction of this court. The main grounds upon which the Supreme Court of the state decided the case were that the relators had been guilty of laches, and that the Act of 1873 did not authorize contracts to be made by the school board in such wise as to bind the city to levy the tax. The Court did not purport to rely upon the Constitution of 1898, or any subsequent legislation, for the result. **It did not purport to enforce any later laws; it simply denied the existence of the right alleged.** Therefore, on the fact of the decision, there is no warrant for coming here. But it is said that this court is not limited to the mere language of the opinion, but will consider the substance and effect of the judgment (**McCullough v. Virginia**, 172 U. S., 102, 116, 117, 43 L. Ed., 382, 387, 388, 19 Sup. Ct. Rep. 134; **Louisiana ex rel. Hubert v. New Orleans**, 215 U. S., 170, 175, ante, 144, 147, 30 Sup. Ct. Rep. 40), and that this court will decide for itself, with due respect for the state decision, whether a contract had been made and what it was (**Sullivan v. Texas**, 207 U. S., 416, 421, 52 L. Ed., 274, 277, 28 Sup. Ct. Rep. 215). Both

of these statements are true, of course, and are relevant when the judgment really gives effect to a later act of the state that would impair the obligation of the contract if the contract were as alleged. But the mere allegation of a later constitution or statute impairing the obligation of the contract gives no jurisdiction to this court to see that the contract is enforced according to its tenor, irrespective of the supposed interference of the later law. **The jurisdiction extends to doing away with such an interference, but not to remedying an erroneous construction of contracts, or to seeing that they are carried out according to the interpretation of this court, apart from it " . . . (Bold Ours)**

In the case of **Crosslake Shooting Club v. Louisiana**, 224 U. S. 612, 56 L. ed. 924, in which the plaintiff in error asserted title to certain lands by reason of purchase thereof from the Board of Commissioners of the Caddo Levee District under act of the Legislature of the State of Louisiana in 1892. It appeared, however, that the Board of Levee Commissioners had never received any patent to the lands in question. Subsequent thereto. In the year 1888, the Legislature of the state of Louisiana passed an act making provision for the sale of said lands. The plaintiffs in error claimed that the act of the State of Louisiana of 1892 was self-executing and had the effect of passing title to the lands to the Levee Board from whom plaintiffs in error purchased the same. The Supreme Court of the State of Louisiana, however, decided otherwise, holding that the Board of Commissioners of the Levee Board by virtue of the Legislative enactment of 1892 acquired no title and could convey none to plaintiff in error.

Writ of error was taken to this Court, which was dismissed on the ground that the Supreme Court of the State of Louisiana had not based its decision upon any subsequent statute, but in interpreting its own laws, held that the plaintiff in error never acquired any title to the land in question.



The Court used the following language:

"With this statement of the case, we come to consider whether it presents any question under that clause of the Constitution which declares: "No state shall . . . pass any . . . law impairing the obligation of contracts." This clause, as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a Federal question. But when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law. But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that the court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired . . . .

"It is most earnestly insisted that, even conceding that our jurisdiction is as restricted as just stated, it still includes the present case, because the decision of the state court, although not expressly rested upon the act of 1902, by necessary implication gave effect to it; and in support of this position it is said that, but for that act, the state could not have maintained the suit.

"But we do not understand that the state's right to maintain the suit was dependent upon that act, nor do we perceive any reason for believing that the act was an influential, though unmentioned, factor in the decision. Under the construction given to the act of 1892 the state still held the title, no conveyance having been made to the board of the levee district, and, of course, the right to maintain the suit was appurtenant to the title.

"What has been said sufficiently demonstrates that no effect whatever was given to the act of 1902, and therefore that the case presents no question under the contract clause of the Constitution; and, as there is no suggestion of the presence of any other Federal question, the writ of error is dismissed." (Bold Ours).

In the case of **Ross v. Oregon**, 227 U. S., 150, 57 L. Ed. 458, the plaintiff in error was convicted of the criminal violation of an Oregon Statute. On appeal to the Supreme Court of the State the contention was made that if the conviction was affirmed it would have the effect of making punishable acts committed since the passage of a state statute, thereby violating the prohibition against ex post facto laws.

This Court held it had no jurisdiction, using the following language:

"Bearing in mind what has been said, and especially that the depository act and Sec. 1807 were both in force at the time of the alleged offense, it will be perceived that the real complaint which we are asked to consider is not that the Supreme Court of the state in any wise rested its judgment upon a statute passed after the time of the alleged offense, but only that it **misconstrued a pre-existing statute to the disadvantage of the plaintiff in error**, and that such a meaning of article I, Sec. 1, of the Constitution, which declares: "No state . . . shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

"But that provision of the Constitution, according to the natural import of its terms, is a restraint upon legislative power, and concerns the making of laws, **not their construction by the courts.** It has been so regarded from the beginning. In **Calder v. Bull**, 3 Dall. 386, 1 L. Ed. 648, one of the first cases in which the provision was considered, it was spoken of as reaching legislative, but not judicial acts; and in **Fletcher v. Peck**, 6 Cranch, 87, 138, 3 L. Ed. 162, 178, Chief Justice Marshall said of it: 'In this form the power of the Legislature over the lives and fortunes of individuals is expressly restrained.' True, neither of those cases turned upon the question whether the words 'no state shall pass a law' embrace a decision of a court construing a statute, but that question was both presented and decided in **Commercial Bank v. Buckingham**, 5 How. 317, 12 L. Ed. 169. There the supreme court of Ohio in an action upon a contract had put upon two pre-existing statutes of the state a construction which was claimed to be unreasonable, and to impair the obligation of the contract, and it was sought to have that decision reviewed by this court on the ground that it denied a right secured by the Constitution of the United States. But the writ of error was dismissed for want of jurisdiction, because, as was said in the opinion (p. 342): 'If this Court were to assume jurisdiction of this case, it is evident the question submitted for our decision would be not whether the statutes of Ohio are repugnant to the Constitution of the United States, but whether the Supreme Court of Ohio has erred in its construction of them. It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary. A like question was presented, and similarly, disposed of, in **New**

**Orleans Waterworks Co., v. Louisiana Sugar Refining Co.**, 125 U. S., 18, 30, 31, 1 L. Ed. 607, 612, 8 Sup. Ct. Rep. 741, \* \* \* And in **Brown v. Smart**, 145 U. S., 454, 458, 36 L. Ed. 773, 12 Sup. Ct. Rep. 958, where a decision of the court of appeals of Maryland expounding a statute of that state was challenged as impairing the obligation of a contract made after the statute came into existence, it was held that the decision 'was not a law' within the meaning of the provision against the impairment of contractual obligations by state laws. Many other cases give effect to this ruling, but it will suffice to cite, from among them, **Central Land Co. v. Laidley**, 159, U. S. 103, 109. " \* \* \*

In the case of **Roker v. Fidelity Trust Co.**, 261, U. S., 114, 67, L. Ed. 556 this Court held that a change of judicial decision was not an impairment of the obligation of contract, using the following language:

"Whether the second decision followed, or departed from the first, it was a judicial act, not legislative. The contract clause of the Constitution, as its words show, is directed against impairment by legislative action; not against a change in judicial decision. It has no bearing on the authority of an appellate court, when a case is brought before it a second time, to determine the effect to be given to the decision made when the case was first there. And see **King v. West Virginia**, 216 U. S., 92, 100, 54 L. Ed. 396, 401, 30, Sup. Ct. Rep. 225; **Messenger v. Anderson**, 225 U. S. 436, 444, 56 L. Ed. 1152, 1156, 32 Sup. Ct. Rep. 739. Assuming that the objection to a change in decision was seasonably presented, it amounted to nothing more than saying that, in the plaintiffs' opinion, the court should follow the first decision. It did not draw in question the validity of an authority exercised under a state in the sense of the writ of error provision. **Philadelphia & R. Coal & I. Co., v. Gilbert**, 245 U. S., 162, 166, 62 L. Ed. 221, 223, 38 Sup. Ct. Rep. 58; **Stadelman v. Miner**, 246 U. S., 544, 546, 62 L.

Ed., 875, 876, 38 Sup. Ct. Rep. 359; **Moss v. Ramey**, 239, U. S., 538, 546, 60 L. Ed., 425, 430, 36 Sup. Ct. Rep. 183; **E. Gasquet v. Lapeyre**, 242 U. S. 367, 369, 61 L. Ed., 367, 370, 37, Sup. Ct. Rep. 165."

As pointed out in **Columbia Ry. & Gas Co. v. South Carolina**, 261 U. S. 244, 67 L. Ed., 633, where Mr. Justice Sutherland said:

"We are met at the threshold with a challenge on the part of the State to our jurisdiction, and this must first be considered. The judgment of the State court, it is asserted, was based upon its own construction of the contract, and not at all upon the Act of 1917.

"As this court has repeatedly ruled, the Constitution affords no protection as against an impairment by judicial decision. • • •

"If, therefore, the judgment, although in effect impairing the obligation of the contract, nevertheless proceeds upon reasons apart from and without giving effect to the statute, this Court is without jurisdiction to review it. **Becan v. Texas**, 163 U. S., 207, 216, 41 L. Ed., 132, 16 Sup. Ct. Rep., 1023, wherein the doctrine is stated as follows:

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the State which has been upheld or effect given it by the State Court. • • •

"If the judgment of the State Court gives no effect to the subsequent law of the State, and the State Court decides the case upon grounds independent of that

law, a case is not made for review by this court upon any ground of the impairment of a contract'." (Bold ours)

The Supreme Court of the State of Mississippi in this case did not give effect to any subsequent statute. It merely for the first time stated what the act of 1890 incorporating plaintiff in error meant; and falls within the reasoning of the case of **Fleming v. Fleming**, 264 U. S. 29, 68 L. Ed. 547, wherein the following language was used:

"In **Tidal Oil Co. v. Flanagan**, decided January 7, 1924, (263 U. S. 444, ante, 382, 44 Sup. Ct. Rep. 197), we had occasion to consider the same issue. After a somewhat full examination, we held that, by a score of decisions of this court, a judicial impairment of a contract obligation was not within Section 10, Article 1, of the Constitution, since the inhibition was directed only against impairment by legislation, and that such judicial action presented no Federal question of which this court could take jurisdiction on a writ of error from a state court.

"It is urged upon us that the impairment here is legislative, in that the case turned on the effect of Section 3376 of the Iowa Code, that the subsequent judicial construction of it became part of the statute, and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed before the making of the contract, and has become a new and different act of the legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law, but only to hold that the law always meant what the court now says it means. The court has power to construe a legislative act, but it has no power, by change in construction, to date its passage as a law from the time of the later decision. A statute in force when a contract was made cannot be made a subsequent

statute through new interpretation by the courts. Any different view would be at variance with the many decisions of this court cited in the Flanagan Case.

"For these reasons, we must hold that the claim of plaintiffs in error does not raise a substantial Federal question, and dismiss the writ of error for lack of jurisdiction."

In addition to the case cited, see the following: **Columbia Railway Company v. South Carolina**, 261 U. S. 236, 67 L. Ed. 629; **Moore-Mansfield Constr. Company v. Electrical Install. Co.**, 234 U. S. 619, 58 L. Ed. 1503; **Frank v. Mangham**, 237 U. S. 307, 59 L. Ed. 969; **McCoy v. Young Elev. Railroad Co.**, 247 U. S. 354, 62 L. Ed. 1156.

The latest case from this court on the question is that of **Western Union Telegraph Company v. Georgia**, advance sheets December 1, 1925, 76 U. S. \_\_\_\_\_, 70 L. Ed.

In that case the State of Georgia owned a railroad and an act was passed authorizing the Attorney General of the State to ascertain by appropriate litigation whether there were any trespasses on the property and to exclude the same. Suit was brought against the Western Union Telegraph Company as a trespasser, and by decision of the Court it was excluded from the property. This court held under a claim of impairment of the obligation of the contract, that the statute authorizing an inquiry into the nature of the right of the plaintiff in error, and a decision against that right independently of the statute, was not giving effect to a subsequent statute, and did not impair the obligation of the contract.

The court used the following language:

"This is all, and it is not enough to give the Telegraph Company a standing here. The statutes do not

prejudge the Telegraph Company's case, or any case. They do not purport to subject the Company to any prohibition or command, or to determine or qualify the Company's rights; they do not attempt to delegate power to do so to commission. They do not even point out the Telegraph Company."

The difference between interpretation and impairment of validity is pointed out by this Court in **Ireland v. Woods**, 246 U. S. 323, 62 L. Ed. 745, and **Arkansas v. St. L. Ry. Co.** U. S. 70 L. Ed. p. 43.

See, also, the case of **Northern Pacific R. R. Co. v. Solum**, 247 U. S. 477, 62 L. Ed. 1221; **Stadelman v. Minor**, 245 U. S. 636, 62 L. Ed. 524; wherein it is pointed out that interpretation and invalidation are fundamentally different.

The Supreme Court of the State of Mississippi did not question the validity, but admitted the same; and, in interpreting the contract held that the contractual exemption did not embrace office buildings.

The rule applied is stated in **Huntington v. Attrill**, 146 U. S., 657-686, 36 L. Ed. 1123-1133, as follows:

"The case, in this regard, is analagous to one arising under the clause of the Constitution which forbids a state to pass any law impairing the obligation of contracts, in which if the highest court of a state decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the state court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. **New Orleans Waterworks**



**Co. v. Louisiana Sugar Ref. Co.**, 125 U. S. 18-38, 31 L. Ed. 607, 614."

The following authorities are directly in point:

**President, etc. v. Bank**, 13 Wall. 432, 20 L. Ed., 513;  
**Bank of Commerce v. Tenn.**, 161 U. S., 144, 40 L. Ed. 649;  
**Missouri R. R. Co. v. Olathe**, 222 U. S., 190, 56 L. Ed., 159;  
**Tidal Oil Co. v. Flanagan**, 262 U. S., 453, 68 L. Ed. 387.

Opposite counsel relies upon several decisions<sup>all</sup> of which are readily distinguishable.

(A) **Y. & M. V. R. R. Co. v. Thomas**, 132 U. S. 174, 33 L. Ed. 302. In that case the contract provided:

"It is hereby declared that said Company, its stock, its railroads and appurtenances, and all of its property in this state, shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River. \* \* \* All of said taxes to which the property of said company may be subject in this State, whether for county or state, shall be collected by the treasurer of this state and paid into the State treasury, to be dealt with as the Legislature may direct; but said Company shall be exempt from taxation by cities and towns."

There was a bill filed in the Chancery Court of Hinds County, setting up the contract:

"And it was averred that the charter, as respects the exemption claimed, was a contract 'irrevocable and protected by the contract clause of the Constitution of the United States; that the unwarranted application of the general laws subsequently passed, as well as the application of the general laws in force at the time, is equiv-

alent to a direct repeal of the charter exemption; and that it is an effectual abrogation of its privilege of exemption by means of authority exercised under the State."

To this bill the tax collector, who was enjoined, demurred. Demurrer was sustained and the bill dismissed. The opening declaration of the opinion is

"The Supreme Court of Mississippi did not put its decision upon the ground that it was not competent under the State Constitution for the State to contract with the Company that the latter should not be subjected to taxation, but upon the ground that exemption claimed could not be allowed. The taxes in question were assessed under the Act of 1888, and if the charter of the Company, which became a law on the 17th day of February, 1882, inhibited such taxation, then this court has jurisdiction to re-examine the conclusion reached. Although by the terms of the Act of 1888 the taxes herein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the Act; so that if a contract of exemption is contained in the Company's charter, then the obligation of that contract is impaired by the Act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the Company."

But by this charter of the college Section 1, all laws are expressly integrated, not repealed; repeals by implication are not favored.

The State Supreme Court did not mention Section 4251, which has nothing to do with the taxing powers of the municipality of Jackson, so far as this record is concerned.

It is well to remember that this court in that case reviewed

the proper mode of interpretation, and "took occasion to re-iterate the well settled rule that exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the language used, construed strictissimi juris."

(B) The case of **Wilmington & Weldon v. Alsbrook**, 146 U. S. 279, 36 L. Ed. 973 but reiterates a rule which we admitted, namely that where:

"In arriving at its conclusions, however, the state court gave effect to the revenue law of 1891 and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry whether it did or not, was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed."

But this court stated in the opening of the opinion

"The jurisdiction of this court is questioned upon the ground that the decision of the Supreme Court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that particular property was embraced by its terms; and that, therefore, such decision did not involve a Federal question."

This is the precise case here. No attack is made upon Section V as an entirety. There is but one question: Does the office building come within the provisions of Section VI? Simply that and nothing more.

(C) **McCullough v. Virginia**, 172 U. S. 102, 43 L. Ed. 382, with deference, does not touch this question, because there the validity of the original statute creating the contract was assailed, and being assailed, was held void, but only after

its validity had been judicially established for many years by the Supreme Court of Appeals of Virginia, and this court; here the contract is not in any wise questioned, but admitted to exist; to be valid in all of its provisions, but construing those provisions, the court held that office buildings were not embraced.

(D) The decision in **Mobile & Ohio v. Tennessee**, 153 U. S. 486, 38 L. Ed. 793 merely reiterates the perfectly well settled rule:

"That the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or nonexistence of a contract in cases like the present, is one which the court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation."

(E) **New Orleans Waterworks Co. v. La. Sugar Ref. Co.** 125 U. S. 18, 31 L. Ed. 607, is not only not contra, but is one of the leading cases for the defendant in error.

(F) **Jefferson Branch Bank v. Skelly**, 1 Black, 436, 17 L. Ed. 173, does not touch the question.

(G) **Yazoo & Mississippi Valley R. R. Co. v. Adams**,

180 U. S. 46, 45 L. Ed. 417 is directly in point and controlling for defendant in error, it being there specifically said:

"Granting that, as the case arose under the 2(d) clause Rev. Stat. Sec. 709, the invalidity of the statute need not be 'specially set up or claimed,' it must appear, under the most liberal construction of that section, that it was necessarily involved, and must indirectly, at least, have been passed upon in the opinion of the Supreme Court; but, for aught that appears, the very statutes under which this road was taxed were in **existence before the road was chartered**, although others, prescribing a different method of assessing and collecting such taxes, may have been passed subsequent thereto. This subsequent legislation, however, may have had, and apparently did have, nothing to do with the disposition of the case." (Bold ours.)

As further said in the **Adams case**, *supra*:

"It is true that the chief justice of the Supreme Court certifies that upon the argument of this case the validity of legislation of the state of Mississippi subsequent to the statute of February 18, 1882, was drawn in question by the company upon the ground of its repugnancy to the Constitution of the United States; but we have repeatedly held that such certificate is insufficient to give us jurisdiction where it does not appear in the record, and that its office is to make more certain and specific what is too general and indefinite in the record. **Lawlar v. Walker**, 14 How. 149, 14 L. Ed. 364, **Gross v. United States Mortg. Co.**, 108 U. S. 477, 27 L. Ed. 795, 2 Sup. Ct. Rep. 940. It is said in **Lawler's Case** that 'the statutes complained of in this case, should have been stated. Without that the court cannot apply them to the subject-matter of litigation, to determine whether or not they

have violated the Constitution or laws of the United States." See also **Missouri & M. R. C. v. Rock**, 4 Wall 177, sub nom. **Mississippi & M. R. Co. v. Rocks**, 18 L. Ed. 381; **Parmelee v. Lawrence**, 11 Wall. 36, 20 L. Ed. 48; **Powell v. Brunswick County**, 150 U. S. 433, 37 L. Ed. 1134, 14 Sup. Ct. Rep. 166; and cases cited."

(H) **Northwestern University v. The People**, 99 U. S. 309, 25 L. Ed. 387: In that case the charter granted to the plaintiff in error contained the following exemption from taxation:

"That all property, of whatever kind or description, belonging to or owned by said corporation shall be forever free from taxation for any and all purposes."

The charter was granted in 1855. The Constitution of 1848 was in force at that time, and contained the following provision:

"Property of state and counties, both real and personal, and such other property as the general assembly may deem necessary for school, religious and charitable purposes, may be exempted from taxation."

It will thereby be noticed that the plaintiff in error secured an absolute exemption forever from the taxation, and that the exemption was expressly permitted under the Constitution of the State of Illinois. Subsequent thereto, to wit in the year 1870, an entirely new and different constitutional provision was provided, restricting the right of exemption the language being as follows:

"The property of the state counties, and other municipal corporations, both real and personal, and such property as may be used exclusively for agricultural and her-

ticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation, but such exemption shall only be by a general law."

In pursuance of such constitutional provision, in 1872 the Legislature of the State of Illinois made the following provision in respect to property which should be exempted from taxation:

"All public schoolhouses. All property of institutions of learning, including the real estate on which the institutions are located, not leased by such institutions, or otherwise used with a view to profit."

And the taxing authorities thereupon took steps to assess the plaintiff in error with all that portion of its property not covered by the exemption act of 1872, and the Supreme Court of Illinois gave effect to the Act of 1872, and, since the Act of 1872 restricted the right of exemption and deprived the plaintiff in error of the right to exemption of a portion of its property, this court very properly held, there being no question about the validity of the contract contained in the charter of plaintiff in error, that there was an impairment of its contract.

In this case, however, the very reverse is true. No subsequent act passed by the Legislature restricted the statutory exemption laws in force, and not only that, but the Supreme Court of the State of Mississippi, in construing the charter of plaintiff in error in this case, did not construe, take into consideration, or give effect of any kind to Section 4251 of the Code of 1906. Upon the other hand, the Supreme Court of the State of Mississippi, treating the original charter as valid, interpreted it as not including real estate not used directly and exclusively for college purposes, but which was rented out and upon which the plaintiff in error received revenue.

(I) *St. Anna's Asylum, etc. v. New Orleans*, 105 U. S. 362, 26 L. Ed. 1128, is not in point. And the same is true as to

(J) *Home of Friendless v. Rouse*, 8 Wall, 430, 19 L. Ed. 495; and

(K) *Washington University v. Rouse*, 8 Wallace, 439, 19 L. Ed. 498.

(L) *Carondelet Canal & Navigation Co. v. Louisiana*, 233 U. S. 372, 58 L. Ed. 1001, is not controlling contra, the Court holding there:

"There is, as we have said, strength in the contention, but, of course, the fact that the Supreme Court did not refer to the act of 1906 does not put it aside from consideration. If it was the assertion of legislative power against the contract of the company, and a legislative provision against the obligation of the contract, and was an essential, although unmentioned, element of the decision under review, it is a basis in the Federal question set up. Nor need bad motives be imputed to the legislature. It is not the motive which caused the enactment of the law which is of account, but the effect of the enactment, impairing the rights resting in the contract. And this, we think, was the effect of the act of 1906. It was treated as an important factor in the state's petition in both the charging part and the prayer. The board of control had something else to do besides to wait. It was an agency of invasion, and it was by its especial command that the attorney general made demand upon the company. And in this the board exercised the power given it, and to remove the impediments to the exercise of the power, 'all laws and parts of laws in conflict with' the act of 1906, which conferred the power, were repealed



The repeal of a law which constitutes a contract is a nimpairment of its obligation."

So that as there pointed out, this subsequent legislative impairment was fundamentally integrated into the decision, but not so in the case at bar.

The reasoning of the plaintiff in error is, *post hoc ergo propter hoc*, which does not integrate this legislative act into the judgment at all.

(M) *Louisiana Ry. & Navigation Co. v. Behrman*, 235 U. S. 164, 59 L. Ed. 175, is not contra, it being expressly stated:

"The defendant in error moves to dismiss, invoking the established rule that, where the state court gives no effect to the subsequent enactment, the jurisdiction of this court does not attach." citing cases. \* \* \*

The equally well established rule was operative there, because as said:

"It is apparent that the whole object of the suit was to establish the right of the city to carry out the subsequent ordinance, which conflicted with and repealed the earlier ordinance so far as it might be construed to give to the plaintiff in error the particular privilege therein described. It was, as appears from the petition itself, to accomplish the purpose of the later enactment, and the building of the belt line thereunder, that the city asked the aid of the court's injunction in this suit; and it was through this protection that the municipal scheme of construction under the later ordinance was actually carried out. The final judgment completed and made permanent this protection, with respect to operation as well as construction, as against the claim of contract right."

**POINT 2 (A). THE ACT ALLEGED TO IMPAIR SECTION 4251 NOT AVAILABLE UNDER THE FEDERAL CONSTITUTION BECAUSE ITS OPERATION EXPRESSLY EXCLUDED FROM PRIVATE ACTS BY THE CODE**

Counsel relies upon **Y. & M. V. R. R. Co., v. Adams**, 77, Miss., 292, for the alleged effect of Section 4251, a general law codified and brought forward in the Code of 1906. But counsel fail to note the express holding in this very case on page 317:

"But it is said that Section 8 of the Code of 1880 provides that 'no private act not revived and brought into this Code shall be affected by its provisions'; and that general laws as to taxation ought not to be held to repeal private grants of exemption, unless expressly so stated. The principle is correct enough."

See, also: **Madison County v. Collier**, 79 Miss., 220, 87 Miss., 204; **Adams v. Denby**, 82 Miss., 140.

Furthermore, the operative acts in the **Adams** case were essentially different, did not contain this express reservation as to private legislation; curiously enough the exemptions there repealed, though to specific companies by name were **under general laws** in no wise similar to this private act.

Turn to Section 608, Code of 1880:

"Section 608. Each Railroad Company whose line is in whole or in part in this State shall, if it accepts the provisions of this act, pay to the state treasurer on the warrant of the auditor, on or before the thirty first day of December, in each and every year, a privilege tax as follows, to-wit: The Mobile and Ohio Railroad Company and branches, eighty dollars per mile; the Memphis and Charleston Railroad Company, eighty dollars per mile; the Chicago, St. Louis and New Orleans Railroad Company and branches, eighty dollars per mile; the Mississippi and Ten-

nessee Railroad Company, seventy dollars per mile; the West Feliciana Railroad Company, twenty dollars per mile; the Natchez, Jackson and Columbus Railroad Company, thirty dollars per mile; the Grand Gulf and Port Gibson Railroad Company twenty dollars per mile; the Alabama Central Railroad Company, seventy dollars per mile; the Mobile and Northwestern Railroad Company, twenty dollars per mile; the Mississippi Valley and Ship Island Railroad Company, twenty dollars per mile; the Ripley Railroad Company, twenty dollars per mile; the Mobile and New Orleans Railroad Company, eighty dollars per mile; the Vicksburg and Meridian Railroad Company, sixty dollars per mile; the Alabama and Chattanooga Railroad Company, seventy dollars per mile; and the Greenville, Columbus & Birmingham Railroad Company, thirty dollars per mile; **Provided**, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed although the whole road may not be finished." And this general act was the bases of the repeal, but although, is not an authority contract.

POINT 2 (B). THE ACT ALLEGED TO IMPAIR SECTION 4251 NOT AVAILABLE UNDER THE FEDERAL CONSTITUTION BECAUSE IT ANTEDATES THE ALLEGED CONTRACT AND HAS BEEN CONTINUOUSLY IN FORCE FROM SUCH ANTERIOR DATE.

Section 4251 (the offending section) provides:

"The following property, and no other, shall be exempt from taxation, to-wit: . . . . .

"(d) . . . All property, real or personal, belonging to any college or institution for the education of youth, used directly and exclusively for such purpose "

(a) **Exemption Statutes:**

Tracing this section from 1857, we have substantially the verbiage, unaltered, Code of 1857, page 73, article 11 is:

"The following property, and no other, shall be exempt from taxation, to-wit: \* \* \* property, real or personal, belonging \* \* \* to any religious society, or incorporated institutions for the education of youth, used exclusively for the benefit and support of such society or institution, or held and occupied by the trustees of schools and school lands of the respective townships, for the use of public schools \* \* \*." (Bold Ours).

In 1871 the Code provided, Section 1662:

"The following property, and no other, shall be exempt from taxation, to-wit:

"Property, real or personal, belonging \* \* \* to any religious society or incorporated institution for the education of youth, used exclusively for the benefit and support of such society or institution, or held and occupied by the trustees of schools and school lands, of the respective townships, for the use of public schools."

Section 468 of the Code of 1880 is the same, was in force at the date of the charter, whereof complaint is sought to be made.

The Code of 1892, Section 3744, segregates and letters the exemptions:

"What property exempt. The following property and no other, shall be exempt from taxation, to-wit:

"(d) All property, real or personal, belonging to any religious or charitable society, or incorporated institution for the education of youth, used exclusively for the purposes of such society or institution, and not for profit."

Hemingway's Code of 1917 contains precisely the same provision, made effective by Chapter 286, Laws of Mississippi 1922, and as, at now, constitutes the law.

Continuously from 1857 until now, said Section 4251, has been effective in Mississippi, and the Legislature has not in any wise passed any act whatsoever to impair, but has merely continued in force those acts which antedated the passage of the charter. **Levy Leasing Co. v. Seigel**, 258 U. S., 248, 66 L. Ed., 603.

(b) **Mississippi Mortmain Statutes.**

Section 1072 of the Code of 1880 provides:

"Any religious society or congregation, or ecclesiastical body, may hold, at any one place, a house or tenement for a place of worship, with proper and reasonable ground thereto attached; a house or tenement, as a place of residence, for their pastor or minister, with proper and reasonable ground thereto attached; a house or tenement to be appropriated and used as a male school, or seminary of learning, with proper and sufficient ground thereto attached; and another house or tenement, to be appropriated as a female school or seminary of learning; and a cemetery of sufficient dimensions, and no more; **provided, that any religious society or denomination may own such colleges or seminaries of learning, as it may think proper, if used for such purpose.**" (Bold Ours).

This is now in effect and has been substantially, continuously, in effect since 1857.

Thereunder, the holding of this property, real estate, would have been a violation of the law, for, when the statutes antedate the contract, they control its interpretation by being thereinto integrated so as to prevent the operation of the contract clause of the Constitution, especially when as here reference to them is expressly made. In Section 1, **Levy Leasing Co.**,

**v. Seigel**, 258 U. S., 248, 66 L. Ed., 603; **Waterworks Co., v. Oshkosh**, 187 U. S., 446, 47 L. Ed., 253.

**In Railroad Company v. McClure**, 10 Wallace, 511, 19 L. Ed., 997:

"But the State has passed no law upon the subject, and the Constitution of the State, which, as construed by the Supreme Court of the State, has worked the result complained of, was in force when the bonds were issued."

**In Lehigh Water Co. v. Corporation, et al.** 121 U. S., 388, 30 L. Ed., 1059, Mr. Justice Harlan declared:

"The only question presented by the record which this court can properly consider is whether the judgment below denies to the plaintiff in error any right or privilege secured by that provision of the Constitution of the United States which declares that: 'No state shall pass any law impairing the obligation of contracts.' Obviously this clause cannot be invoked for the reversal of the judgment below. It is equally clear that the law of the state to which the Constitution refers in that clause must be one enacted after the making of the contract, the obligation of which is claimed to be impaired."

**In Pinney v. Neilson**, 183 U. S. 147, 46 L. Ed., 127, Mr. Justice Brewer declared:

With reference to the contention that the law of California impairs the obligation of the contract of stockholders, it is enough to say that that law, both constitutional and statutory, was enacted long before the incorporation of the Los Angeles Iron and Steel Company, and that, therefore, Section Ten of Article One of the Federal Constitution has no application. "It is equally clear that the law of the state to which the constitution refers in that

clause must be one enacted after the making of the contract, the obligation of which is claimed to be impaired.' **Lehigh Water Co., v. Easton**, 121 U. S., 388, 30 Ed., 1059. See, also, **Central Lumber Co., v. Laidley**, 159 U. S., 103, 40 L. Ed., 91, 16 Sup. Ct. Rep. 80; **McCulloch v. Virginia**, 172 U. S., 102, 43 L. Ed., 382, 387, and 19 Sup. Ct., 134."

And this case was approved in 241 U. S., 651, 60 L. ed., 1299.

See, also, **Diamond Glue Co., v. U. S. Glue Co.**, 187 U. S., 611, 47 L. Ed., 331.

The principle is really Horn Book Law. Note, **12 Corpus Juris**, 988:

"All retroactive statutes passed after March 4, 1789, although enacted in proper form and otherwise unobjectionable, are void if they impair the obligations of contracts. The contract provision of the Constitution, however, does not operate to make void statutes passed before the making of the contracts which they affect."

Wherefore, as the alleged impairing law antedated the contractual obligation, it could not impair the same within the prohibition, and the decision of the State Supreme Court was but a construction, by that court of its own laws, which can at no time constitute an impairment within the meaning of the Constitution.

B. The principle controlling here is stated in **Leasing v. Seigel**, 258 U. S. 242, 66 L. Ed. 595, where it was said at page 248-606:

"The first is that the defense sustained in this case, by the court below, was provided for by chapter 136 of the Laws of New York, in effect when the lease involved

was executed. The provision was simply carried into chapter 944 when that chapter was amended in September, 1920, and, of course, a lease made subsequent to the enactment of a statute cannot be impaired by it. **Oshkoosh Waterworks Co. v. Oshkoosh**, 187 U. S. 437, 446, 47 L. Ed. 249, 253, 23 Sup. Ct. Rep. 234."

**Fifth Avenue Coach Co. v. New York**, 221 U. S., 467, 55 L. Ed. 865; **Consumers Co. v. Hatch**, 224 U. S., 148, 56 L. Ed. 703, **Munday v. Trust Co.**, 252 U. S., 499, 64 L. Ed. 684

POINT 2 C. THE ACT ALLEGED TO IMPAIR SECTION 4251 NOT AVAILABLE UNDER THE FEDERAL CONSTITUTION BECAUSE UNDER ADMISSION OF COUNSEL SECTION 4251 IMMUNIZING REALTY FROM TAXATION IS AS BROAD AS THE EXEMPTION IN SECTION V

Section 4251 is as hereinbefore quoted

In the Suggestion of Error, counsel states, (Tr. 21)

"Another point which we desire to impress on the Court is that the property here involved would have been exempt under the general statute in force at the time this charter was granted. Section 468 of the Code of 1880 was in force, and this Section provided, among others, for the following exemption: '... property, real or personal, belonging to any incorporated institution for the education of youth used exclusively for the benefit and support of such institution.' When it is considered what this corporation was agreeing to do for the state it is hard to conceive that the Legislature intended to give to it a less favorable exemption than was provided for by the general statutes at the time."

Counsel at page 53 of his brief states:

"In the next place, under the general exemption



granted by the general statute, in force at the time this charter was granted, to incorporate institutions for the education of youth, the property involved in this case was exempt from taxation. At the time this charter was granted, Section 468 of the Code of 1880 was in force, and it provided for exemptions from taxation as follows:

" . . . Property, real or personal, belonging to the United States, or to this state, or to any county or incorporated city or town within the same, or to any religious society or **incorporated institution for the education of youth**, used exclusively for the benefit and support of such society or institution. (Bold ours.)

" . . . Is it conceivable, in view of all this college in its charter was agreeing to do for the State, that the State would have accorded to it less favorable consideration in the matter of exemption from taxation than it accorded by general law then in force to all incorporated educational institutions?"

But counsel errs. See **Odd Fellows v. Redus**, 78 Miss. 352.

But counsel did not rely on the general law and overlooks the fact that Section 468 is Section 4251. Section 468 itself declares:

"The following property, and no other, shall be exempt from taxation, to-wit: "

And then follows the exemptions quoted by counsel. Turning to Section 4251, whereof complaint is made, we find it precisely declared:

"The following property, **and no other**, shall be exempt from taxation, to-wit: . . . "

"**All property, real and personal** belonging to any

college or institution for the education of youth, used directly and exclusively for such purpose."

Counsel did not rely on this general exemption, which, he says, exempts, and if it does exempt, he should have claimed it in the state court when the state decision would have been final. Assuming that it did exempt, as counsel says it did, then Section 4251 cannot impair the obligation of the contract, because it is the exemption of 1880; therefore, the court merely interpreted, and interpreting did not give effect to any subsequent law.

Counsel is, therefore, helpless, because 468, Code of 1880, being the precise equivalent of Section 4251, Code of 1906, everything that was exempt under Section 468 is equally exempt under Section 4251. It is not contended that Section 468 was repealed in any way by Section V of the charter. Section 4251, under counsel's admission, cannot impair that which coordinates perfectly, in accordance with his contention, with Section 468.

In short, interpreting Section 468 as the equivalent of Section 4251, counsel hopelessly destroys any appeal to this court, because of the integration of Section 468 into his contract by the express provision of Section One, *supra*, of his charter, which would make as a part of his charter as well Section 4251.

In fact, Section 4251 declares "all property," while Section 468 contents itself with "Property" merely. The latter act is the broader.

Counsel does not rely on the general exemption but only on Section V.

POINT 2 D. THE ACT ALLEGED TO IMPAIR SECTION 4251 NOT AVAILABLE UNDER THE FEDERAL CONSTITUTION BECAUSE SECTION 4251 MERELY CODIFICATION OF EXISTING LAW.

Section 6878 Hemingway's Code, is now operative (Chapter 286, Laws of Mississippi, 1922) "As the official compilation of the statutes of the State of Mississippi; that it shall be used as the statute laws of this state in all courts and places where the same may come in question," replacing Section 4251 Code of 1906.

The Code of 1906 was prepared in virtue of the Act of March 19, 1904 (Laws of Mississippi 1904, 141), whereby it was provided:

"That the governor be, and he is hereby authorized and directed to appoint three suitable persons, one from each Supreme Court District, learned in the law as commissioners, whose duty it shall be to **revise, arrange and classify** all the statute laws of this State of a general nature into one Code." (Bold ours).

The Act of Adoption declared:

"That the Mississippi Code of 1906 of the public statute laws of the State of Mississippi, compiled by authority of the legislature by A. H. Whitfield, T. C. Catchings and W. H. Hardy, commissioners, and **reported** to the legislature by them, and **revised, amended and adopted**, by the two houses of the legislature, an enrolled draft which has been prepared by the joint revision committee of the two houses appointed for that purpose, be and the same is hereby adopted and declared to be the **official code** of Mississippi. • • • " (Bold ours).

So that the adoption of this Section 4251 was not as a new and independent piece of legislation, but merely the pro-

jection of that which had previously theretofore existed, merely codified for convenience; it having been the law, certainly, since 1857; see Code of 1857, Article 11, page 73; Code of 1871, Section 1662; Code of 1880, Section 468 (as to which note counsel's remarks; Suggestion of Error (Tr. 21); Code of 1892, Section 3744; **Levy Leasing Co. v. Beigel**, 258 U. S., 248, 66 L. Ed. 603.

POINT 2 (E). THE ACT ALLEGED TO IMPAIR SECTION 4251 NOT AVAILABLE UNDER THE FEDERAL CONSTITUTION, BECAUSE THE CHARTER UNDER SECTION 1 NOT SUCH A CONTRACT AS MAY BE LEGISLATIVELY IMPAIRED, BEING SUBJECT TO REPEAL AND ALTERATIONS.  
Section 1 expressly provided

"And they are hereby constituted a body corporate and politic . . . and may accept donations of real and personal property for the benefit of the college hereafter to be established by them, and contributions of money or negotiable securities of every kind, in aid of the endowment of such college, and may confer degrees and give certificates of scholarship, and make by-laws for the government of said college and its affairs, as well as for their government, and do and perform all other acts for the benefit of said institution and the promotion of its welfare, that are not repugnant to the Constitution and Laws of this State or the United States." \* \* \* (Bold ours.)

Thereunder this Court held in the **Pennsylvania College cases**, 13 Wall., 214, 20 L. Ed. 553, that there could be no impairment of such a contract because repealable under such a provision. The college contracted for continual coordination with statutes of Mississippi, and this acquisition of wealth contravened, expressly, the prohibitions hereinbefore quoted

POINT 3. THIS CHARTER, BEING A LOCAL ACT, EXPRESSLY INTEGRATES RIGHT OF MISSISSIPPI TO LEGISLATE; TO CONDITION ALL THAT WAS TO BE THEREUNDER, UPON COORDINATION WITH CONSTITUTION AND STATUTES OF MISSISSIPPI PROHIBITING LAND OWNERSHIP; SUCH ACQUISITION BEING ILLEGAL, EXEMPTION NOT OPERATIVE.

Section one of the charter, quoted above, conditions all to be owned, to be done by the corporation upon conformity to "the constitution and laws of this State, or of the United States."

As pointed out by Mr. Justice Story in the Dartmouth College case, 4 Wheat, 712, 4 L. Ed. 677:

"If the legislature means to claim such an authority, it must be reversed in the grant."

As far back as 1838, Hutchinson's Code, it was provided:

"This act shall not be construed to vest any privileges which may not be repealed by the legislature."

Express reference was made, contractually by Section 1 to those things that were and were to be in the constitution, in the statutes of Mississippi, and all of these were to condition that which might be done under the charter.

In the **Pennsylvania College Cases**, 13 Wallace, 214, 20 L. Ed. 553, speaking through Mr. Justice Clifford, this court said:

"Private charters, or such as are granted for the private benefit of the corporators, are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume

by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature or its benefits diminished or impaired without the assent of the incorporators than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or in some general law of the state which was in operation at the time the charter was granted. *Cool. Const. Lim.* 279; **Birmingham Bridge Case**, 3 Wall. 51, 18 L. Ed. 137; **Piqua Bank v. Knoop**, 16 How. 369; **Vincennes Univ. v. Indiana**, 14 How. 268; **Planters' Bk. v. Sharp**, 6 How. 301.

"Apply those principles to the case under consideration, and it is quite clear that the decision of the state court was correct, as the 5th section of the charter, by necessary implication, reserves to the state the power to alter, modify or amend the charter without any prescribed limitation. Provision is there made that the constitution of the college shall not be altered or alterable by any ordinance of law of the trustees, 'nor in any other manner than by an act of the legislature of the commonwealth,' which is in all respects equivalent to an express reservation to the state to make any alterations in the charter which the legislature in its wisdom may deem fit, just, and expedient to enact, and the donors of the institution are as much bound by that provision as the trustees. **R. V. Dudley**, 14 N. Y. 354; **Plank Road v. Thatcher**, 11 N. Y. 102."

The rule thus stated controls here, because it will never be presumed where coordination with statutes and constitution is required, that the statutes and constitution are to mean those existing at a former date. The welfare of the people demands the right to legislate, and everything that was to be owned by the college, or rather the church, under Section Five, was to be fixed by law.

Ownership of these office buildings has been continuously illegal. **Central Methodist Church**, *supra*; **Gunter case**, *supra*, and **Baptist Hospital case**, *supra*.

There is no express authorization for the acquisition of realty when such acquisition violates the law.

Section 4251 is a rescript of Section 468, and was passed in pursuance of the reserved right of Mississippi to legislate.

The obligation of a contract required performance in accordance with its terms,—when its terms are complied with by the State, no impairment can be claimed. But integrated into this obligation was coordination with the Constitution of Mississippi and the laws thereof. This was expressly agreed to by the contracting parties.

But it may be said that the contract had reference to the Constitution and laws in force at its making, and that these alone were to admeasure what might thereunder be done.

There are many answers:

(a) The laws that were then in force are still in force and it was just as illegal for the church to own office buildings then as it is now. The law has not changed—*ita scripta est*. **Methodist Church v. Meridian**, *supra*; **Gunter v. Jackson**, *supra*.

(b) But this contract with the college was to be performed in the future—its execution required time—much time and is now, nearly fifty years after its grant, still being performed. It was not the intention of the contracting parties to bring forward, as a part of the contract, those laws that existed when the charter was granted and condition both the college and the state by laws that in course of time, of necessity, would become inapplicable—to say the least. This con-

tract looking to the future, embraced within its terms, not the laws that then were alive but those that were yet to be; and as soon as they came into being, each conditioned this contract by reason of an express provision that should be the case.

Consistent coordination with the Constitution and statutes was contracted for. This left the Legislature with the fundamental right to protect the welfare of the state, unhampered by any contractual obligation.

No obligation of this contract could be impaired, when, many years prior to the acquisition of these office buildings, the legislature had seen proper to prohibit Major Millsaps, as an individual, from giving to a church this realty. Millsaps was subject to law. The church was subject to law. And coordination with law conditioned to be acquisition and ownership. Conditioned, thus, its acquisition was, and is, contrary to local law, and being contrary to local law, it is not exempt by local law from taxation.

**Gunter v. City of Jackson**, *supra*, and **Methodist Church v. Meridian**, *supra*, following **Society v. Boston**, 90 N. E. 573; and **City v. City**, 53 Atl., 399.

Under Section I of the charter therefore, the charter was subject to alteration, amendment and repeal.

#### POINT 4. REQUISITE PARTIES OMITTED FROM WRIT OF ERROR

The judgment by the Supreme Court of the State of Mississippi is found (Tr. 14). Thereunder the judgment of the Circuit Court is "affirmed and that appellee do have and recover of appellants and W. M. Buie and Thad B. Lampton, sureties in the supersedeas bond, the costs of this cause in this court and in the court below to be taxed."



In Mississippi, at law, a judgment is an entirety. **Comenits v. Bank**, 85 Miss., 662; **Weis v. Aaron**, 75 Miss., 140; **Parisot v. Green**, 46 Miss., 750; **Thomas v. Wyatt**, 17 Miss., 309.

In this aspect, **Bank of Philadelphia v. Posey**, 92 Sou., 840, 130 Miss., 520; 95 So., 134, 130 Miss., 825, in no way impairs. So, that with a final judgment in the Mississippi Court, affirming the judgment of the Court below and rendering a judgment, as an entirety, against the plaintiff in error and, also, Buie and Lampton, this Writ of Error is prosecuted by the college, alone, Lampton and Buie not joining therein.

In **Mason v. United States**, 136 U. S., 581, 34 L. Ed. 545, the syllabus correctly states the decision thus:

"Where a judgment is joint, against several, and the interests of all are affected by the judgment, all must join in the Writ of Error, or it will be dismissed unless there has been a summons and severance.

"(2) Where the Writ of Error was sued out by a part only of joint defendants against whom a joint judgment was rendered, this court will not permit it to be amended here by inserting names of the other defendants as plaintiffs in error, nor a judgment of severance on their consent."

**Hardee v. Wilson**, 146 U. S. 181; approved in **Haight v. Robinson**, 203 U. S. 581.

See also: **Feibelman v. Packard**, 108 U. S. 14; **Simpson v. Greeley**, 20 Wall. 162; **Masterton v. Herndon**, 10 Wall. 416; **Williams v. Bank**, 11 Wheat. 414.

See as to an appeal:

**Moon v. Simonds**, 100 U. S. 145; **Smith v. Strader**, 12 How. 327.

In **Estes v. Trabue**, 128 U. S. 230, the court said:

"It is well settled that all parties against whom a judgment of this kind is entered must join in a writ of error, if anyone of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered."

These decisions rendered it absolutely certain, therefore, that the writ of error herein should have been sued out by Millsaps College, by Lampton and by Buie, and the writ not being in any way participated in by Lampton and Buie, of necessity the same has to be dismissed.

Section 1005 of the Revised Statutes does not reach **Mason v. U. S.** *supra*, **Estes v. Trabue**, *supra*; **Hardee v. Wilson**, *supra*.

The contention that a surety is not an essential party is settled by numerous of the foregoing decisions.

In **Thomas v. Wyatt**, 17 Miss. 309, that court says:

"The action was replevin, brought by Thomas against Wyatt. The verdict was for the defendant, and the court rendered judgment as the statute requires, against the plaintiff and his sureties in the bond for the amount of the verdict. There were two sureties, but Thomas alone sues out the writ of error, which writ recites a judgment against Thomas in favor of Wyatt. The record returned shows a judgment against Thomas and Lansdale and Bryan as sureties. It is immaterial in what character Lansdale and Bryan became parties to the judgment. It is against the three parties as a joint judgment, and of course they should be joined in the writ of error."

See **Whitworth v. Carter**, 41 Miss. 640, wherein a review of the Mississippi decisions is had.

See also: **Green v. Bank**, 3 How. (Miss.) 43; **Duvall v. Cox**, 5 How. (Miss.) 12; **Barker v. Wanzer**, 5 How. 290; **Flournoy v. Burke**, 4 How. 337; **Henderson v. Wilson**, 4 S. & M. 732; **Peira v. Silver**, 4 S. & M., 735; **Hoggatt v. Ferrell**, 41 Miss., 643; **Sellers v. Smith**, 39 So. 356.

POINT 5. THE SUPREME COURT OF THE STATE OF MISSISSIPPI CORRECTLY CONSTRUED THE CHARTER OF THE PLAINTIFF IN ERROR.

If this court should take jurisdiction, and thereby, deem it necessary to review the correctness of the decision of the State Supreme Court, still the interpretation of the contractual rights of the plaintiff in error as to exemption from taxation was correct. The question presented is, not what this Court, itself, might have decided under identical facts, not, as to whether or not, the charter is susceptible of any different construction, but whether the charter, from any reasonable standpoint, admits of the construction placed thereon by the Supreme Court of the State of Mississippi where construed as a statute of the State of Mississippi. **Chicago Theological Seminary v. Illinois**, 188 U. S. 662, 47 L. Ed. So. 641.

(a) The construction of this local statute, even though a charter, announced by the State Court should be adopted unless manifestly wrong.

The proposition is necessarily true. **Edward Hines Yellow Pine Trustees v. Martin**, *supra*. The plaintiff in error is entitled to only such exemption from taxation as the legislature intended to give by this local statute of Mississippi though it be in the form of a charter of incorporation, still fundamentally it is at all times but a private statute of Miss.

issippi. In interpreting the statute, it was the duty and function of the Supreme Court of the State of Mississippi to gather the legislative intent and construe this local statute in accordance therewith. It therefore became necessary for the Supreme Court of the State of Mississippi to put itself in the place of the legislature of Mississippi in 1890, the time of the passage of the act, to get its point of view. The State Supreme Court was more capable of arriving at the legislative intent and construing this charter than any other court could possibly be. This principle has always been fully recognized and strictly adhered to by this court. In **Chicago Theological Seminary v. Illinois**, 188 U. S. 662, 47 L. Ed. 641, this Court used the following language:

"Here are two different constructions of the exemption clause, each of which might be maintained with some plausibility. That view which limits the range of the exemption to property used in immediate connection with the seminary might seem to many to be the correct one, while in the opinion of others, the broader claim of total exemption would be the best founded. The judges of the Supreme Court of Illinois have unanimously taken the former view, while counsel for the plaintiff in error very strongly and very ably has taken and maintained the other. We can ourselves see that a construction either way would not be clearly erroneous, or, at any rate, either construction would not be so obviously erroneous as to leave no doubt upon the question. In such cases, we think the rule as to the construction of statutes of exemption from taxation should be applied, and as there may be room for reasonable doubt whether a total or only a partial exemption was meant, the partial exemption should alone be recognized. Great weight ought also be attached to the decision of a State court regarding questions of taxation or exemption therefrom under the Constitution or laws of its own state. As is said in *Wilson v.*

**Standefer**, 184 U. S. 399, 412, 46 L. Ed. 612, 618, 22 Sup. Ct. Rep. 384, 389: 'Especial respect should be had to such decisions when the dispute arises out of general laws of a state, regulating its exercise of the taxing power, or relating to the state's disposition of its public lands. In such cases, it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of the laws, and knowledge of such particulars will most likely be found in the tribunals whose special function is to expound and interpret the state enactments.' We acknowledge and affirm the principle that this court in this class of cases must decide upon its own responsibility as to the existence and meaning of the contract, but in arriving at such meaning in a case like this, the decision of the state court is entitled to exercise marked influence upon the question this court is called upon to decide and where it can not be said that the decision is in itself unreasonable, or in violation of the plain language of the statute, we ought, in cases engendering a fair doubt, to follow the State Court in its interpretations of the statutes of its own state.'

(Bold ours).

In the case of **Jetton v. University of the South**, 208 U. S., 489, 52 L. Ed., 584, it was said:

"Upon the question of the proper construction of the exemption clause of the charter, the case of the **University of the South v. Skidmore**, 87 Tenn., 155, 9 S. W., 892, is cited, and it is urged that within that case no tax can be assessed against the lessees of this property within the 1,000 acres. While in such a case as this we form our own judgment as to the existence and construction of the alleged contract, and are not concluded by the construction which the State Court has placed upon the statute that forms such contract, yet we give to that

construction the most respectful consideration, and it will, in general, be followed, unless it seems to be plainly erroneous."

See, also, **Edward Hines Yellow Pine Trustees v. Martin**, *Supra*.

The local Court's interpretation of its local statute should control, especially as the specific question was foreclosed in the **Chicago Theological** case, *supra*. Where similar property was taxed though the exemption, with deference, was broader.

(b) **The right to exemption, in order to relieve property from taxation must be manifest, clear and unambiguous, and every doubt must be resolved in favor of the right of taxation.**

The college, soon after the acceptance of its charter, acquired and now holds a large tract of land within the corporate limits of the City of Jackson, which it uses as a campus and for other college purposes, and upon which it has constructed residences, as well as expensive and commodious college buildings. It has acquired, by donation, to its endowment fund very large gifts of money and securities, and it has an endowment fund invested in mortgages and other securities, exceeding in value the sum of one half million dollars, all of which real and personal property is and has always been exempt from taxation, not only under its charter, but by virtue of the general laws of the state.

The plaintiff in error, more than thirty years after the enactment of its charter, situated in the City of Jackson during all such time, having and enjoying the governmental protection of the state, county and a highly developed and efficiently organized municipality, asserts under its charter the right, as part of its endowment fund, to hold free from taxation, very valuable commercial, revenue producing prop-

erty, from which the state, county and municipality have always received taxes, and upon which taxes, each of such taxing powers relies for its support and maintenance. A mere statement of the case, and the facts are not overstated, justifies the announcement of the rule that before the claim asserted by the plaintiff in error to exemption from taxation should be admitted and allowed, its right thereto under its charter must be clear and free from doubt.

In the case of **Vicksburg, B. & P. R. R. Co. v. Dennis**, 116 U. S. 665, 29 L. Ed. 770, this Court used the following language:

"In determining whether a statute of a state impairs the obligation of a contract, this court doubtless must decide for itself the existence and effect of the original contract, although in the form of a statute, as well as whether its obligation has been impaired. **Louisville & N. R. R. Co. v. Palmes**, 109 U. S. 244, 256, 257, (Bk. 27 L. Ed. 922, 926,) and cases cited; **Wright v. Nagle**, 101 U. S. 791, 794, (Bk. 25 L. Ed. 921, 922.) But the construction given by the Supreme Court of Louisiana to the contract relied on in the present case accords not only with its own decision in the earlier case of **Baton Rouge Railroad v. Kirkland**, 33 La. Ann. 622, but with the principles often affirmed by this court.

"In the leading case of **Providence Bank v. Billings**, 4 Pet. 514, (29 U. S. Bk. 7 L. Ed. 939), Chief Justice Marshall, speaking of a partial release of the power of taxation by a state in a charter to a corporation, said: 'That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it can not be necessary to reaffirm.'

"As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in

which the deliberate purpose of the State to abandon it does not appear. We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction." 4 Pet. 561-563 (29 U. S. Bk., 7 L. Ed. 955, 956.)

"In Philadelphia, etc., R. R. Co. v. Md., 10 How. 376 (51 U. S. bk. 13 L. Ed. 461), Chief Justice Taney said: This court on several occasions has held that the taxing power of a state is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." Id. 393, (Id. 468).

"In the subsequent decisions, the same rule has been strictly upheld and constantly reaffirmed in every variety of expression. It has been said that, 'Neither the right of taxation nor any other power of sovereignty will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken,' that exemption from taxation 'should never be assumed unless the language used is too clear to admit of doubt,' that 'nothing can be taken against the State by presumption or inference; the surrender when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arise as to the intent of the Legislature, that doubt must be solved in favor of the State;' that a State can not by ambiguous language be deprived of this highest attribute of sovereignty; that any contract of exemption 'is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require,' and that such exemptions are regarded 'as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, construed strictissimi juris (Citing cases).



In **Wilmington & Welbon R. R. Co. v. Alsbrook, Sheriff**, 146 U. S. 279, 36 L. Ed. 972, the following language was used:

"The applicable rule is too well settled to require exposition of the citation of authority. The taxing power is essential to the existence of government, and can not be held to have been relinquished in any instance, unless the deliberate purpose of the state to that effect clearly appears. The surrender of a power so vital can not be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power."

In **New York ex rel. v. State Board of Tax Comm'rs**, 199 U. S. 1, 50 L. Ed. 65, the court used the following language:

"It must be borne in mind that presumptively all property within the territorial limits of a State is subject to its taxing power. Whoever insists that any particular property is not so subject has the burden of proof, and must make it entirely clear that, by contract or otherwise, the property is beyond its reach. \* \* \*

"In the **Vicksburg S. & P. R. Co. v. Dennis**, 116 U. S. 665, 29 L. Ed. 770, 6 Sup. Ct. Rep. 625, Mr. Justice Gray cited many authorities, quoting the different phraseology in which, by the several writers of the opinions, the same rule was announced. In **Wells v. Savannah**, 181 U. S. 531, 45 L. Ed. 986, 21 Sup. Ct. Rep. 697, the law was thus stated by Mr. Justice Peckham, (p. 539, L. Ed. p. 991, Sup. Ct. Rep. p. 700): 'The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment; and the validity of such contract presupposes a good consideration therefor. If the property be, in its nature, taxable, the contract exempting it from

taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else, it must be implied from facts which leave no room for doubt that such was the intention of the parties, and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven, and the exemption does not exist.

"In **Chicago Theological Seminary v. Illinois**, 188 U. S. 662, 47 L. Ed. 641, 23 Sup. Ct. Rep. 386, the same Justice declared, (p. 672, L. Ed. p. 648, Sup. Ct. Rep. 387): 'The rule is that, in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it can not exist by implication only; a doubt is fatal to the claim.'

"See, also, **Erie R. Co. v. Pennsylvania**, 21 Wall. 492, 22 L. Ed. 595; **Wilmington & W. R. Co. v. Alsbrook**, 146 U. S. 279, 36 L. Ed. 972, 13 Sup. Ct. Rep. 72; **Ford v. Delta & P. Land Co.**, 164 U. S. 662, 41 L. Ed. 590, 17 Sup. Ct. Rep. 230.

"This rule is akin to, if not part of, the broad proposition, now universally accepted, that in grants from the public nothing passes by implication. **Charles River Bridge v. Warren Bridge**, 11 Pet. 420, 549, 9 L. Ed. 773, 824."

In **Ford v. Delta & Pine Land Co.**, 164 U. S. 666, 41 L. Ed. 592, it is said:

"It is abundantly established by the decisions of this, as of other courts, that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter or necessary scope of the exemption clause." (citing many cases.)

"Indeed, there has been strong judicial dissent from the doctrine of the power of the State Legislature to create a permanent exemption from taxation. **Washington University v. Rouse**, 75, U. S., 8 Wall., 439, 443, 19 L. Ed., 498, 500.

"And should taxes continue to mount as they have in the last few years we may say, without hope of successful contradiction, that the power to tax must needs be placed in the same category as the police power and no permanent immunity be therefrom granted because the safety, welfare and happiness of the people may be destroyed by the failure to possess power to raise the revenue requisite.

"The situation is critical and is becoming more so, and each exemption must needs, in the light of the increasing burden of taxation, be more critically examined."

In **Berryman v. Board of Trustees**, 222 U. S., 334, 56 L. Ed. 225. The court used the following language:

"We at once, moreover, concede, for the sake of the argument, that the exemption from taxation which was conferred was upon a consideration, and therefore, rested in contract, and if it was in the power of the territorial government to make, is protected from impairment by the contract clause of the Constitution. With this concession in mind and before coming to determine whether the exemption was valid, that is, whether in and by virtue of the prohibition in the organic law forbidding special privileges, the territorial legislature was incompetent to grant a contract exemption, we briefly advert to the contention made that a broad meaning must be given to the organic act for the purpose, if it can be done, of establishing that there was no limit upon the power of the territorial legislature to exempt. It is conceded that the elementary rule is that exemptions from taxation must be strictly construed. But it is said that this applies

only to the contract of alleged exemption, and has no relation to the inquiry whether the legislature had the power to exempt, because full legislative power must be presumed to exist, unless there be a plain prohibition to the contrary. While we are of opinion that the contention has no direct bearing on the more important proposition here to be decided, we can not give it, even by silence, or assent, because we consider that it admits, on the one hand, the rule of strict construction, and at once denies it upon the other, by improperly restricting the area of its operation. We say this, because, if in a particular case, the duty arises of determining whether words of restriction found in the fundamental law are intended to operate a limitation on the legislative power to grant contract exemptions from taxation, the rule of strict construction is just as applicable as it would be to a case where it was applied for the purpose of determining whether the particular terms of an alleged contract did or did not embrace an exemption from taxation. We think the rule of construction is as broad as the subject to which it relates, and its operation does not depend upon whether the question is one of limitation of legislative power or of the true interpretation of a contract asserted to be one of exemption."

In *Yazoo & Miss. Valley R. R. v. Thomas*, 132 U. S. 185, 35 L. Ed. 307, Mr. Chief Justice Fuller, in dealing with an immunity from taxation at substantially this date in Mississippi, said: "And the Court took occasion to reiterate the well settled rule that exemptions from taxation are regarded as in derogation of the sovereign authority and of common right and therefore, not to be extended beyond the exact and express requirements of the language used construed *strictissimi juris*."

(C) The charter analyzed and construed.

An analyzation of the charter of the plaintiff in error demonstrates the correctness of the decision of the Supreme Court of the State of Mississippi in this case.

The holding of the Court was that the plaintiff in error could claim as exempt from taxation (a) the lands or grounds not to exceed one hundred acres used by the corporation as a site and campus, including the buildings, halls, and dormitories thereon erected; (b) The endowment fund, consisting of notes and securities; but that land and buildings not being used exclusively and directly for college purposes, and which was rented out for profit, was not included in the grant.

It will be noted that the Supreme Court of the State of Mississippi held that the plaintiff in error was entitled to have exempt from all taxation the same identical property and no other which the legislature of the State of Mississippi specifically empowered plaintiff in error to acquire and own. Section 4, Tr. 4, contains the following language:

"That the said trustees, when organized as hereinbefore directed, shall be known by the corporate name set out in the first section of this act, and all money, promissory notes and evidences of debt heretofore collected under the direction of said conferences for said college, shall be turned over to and receipted for, by them in their said corporate name, and the payee of all such notes and evidences of debt shall endorse and assign the same to the corporation herein provided for, which shall thereafter be vested with the full legal title thereto, and authorized to sue for and collect the same. The said corporation shall have the power to select any appropriate town, city or other place in this State, at which to establish said college and to purchase grounds, not to exceed one hundred acres, as a building site and campus therefor, and erect thereon such buildings, dormitories,

and halls as they may think expedient and proper, to subserve the purposes of their organization, and the best interest of said institution, and they may invite propositions from any city, or town, or individual in this State for such grounds, and may accept donations or grants of land for the site of said institution."

It is, of course, elementary that in arriving at the legislative intent the charter should be considered in its entirety. In determining the property which the plaintiff in error acquired the right to hold exempt from taxation, Sections 4 and 5 of the charter should be read and considered together. Section 4 does not confer upon the plaintiff in error power and authority to acquire or hold commercial property for investment as part of its endowment. It is not necessary for this Court to determine as to whether or not plaintiff in error had the right under any circumstances to acquire and hold title to real estate for any other purpose than specifically stated in the charter.

However, the right to claim property exempt from taxation will never be inferred or implied, since the charter authorized the plaintiff in error to acquire and own certain specific property, to-wit:

(a) Money, evidences of indebtedness, etc. (b) land, not to exceed one hundred acres, to be devoted exclusively and directly for college purposes; and in providing the property which it might claim as exempt from taxation the same designation and description was used, certainly the decision of the Supreme Court of the State of Mississippi that the legislature did not intend to exempt any other property, is consistent with sound reason.

It is perfectly manifest that the legislature of the State of Mississippi only contemplated that the plaintiff in error

would acquire and own two kinds of property above designated, to-wit: (a) lands, not to exceed one hundred acres, for college purposes; (b) money and choses in action, as constituting the endowment fund.

It can hardly be claimed, with any show of reason, that the Legislature in 1890 intended to exempt from taxation a species of property which it did not specifically authorize the plaintiff in error to own.

The direct question was before the Supreme Court of the State of Mississippi in the case of **Methodist Church v. Meridian**, 89 So. 650, 126 Miss. 78.

The Methodist Church of Meridian, Mississippi, owned a vacant lot in the City of Meridian, upon which there had formerly been situated a parsonage, and which it was intending to convert into money, the proceeds to be used in the payment of a new church. Section 934 Miss. Code 1906, 4110 Hemingway's Code, provides that a religious society or congregation may own certain property, but no other. The property permitted to be owned by such society or congregation did not include the lot in question.

The Methodist Church claimed that the property was exempt from taxation under Section 4251 Miss. Code 1906, Hemingway's Code 6878, as property belonging to any religious or charitable society, and used exclusively for the purposes of such society, and not profit.

The Supreme Court of Mississippi held that since the church was not specifically authorized to acquire and own the lot in question, the same could not be claimed by it as exempt from taxation.

The court used the following language:

"It will be seen from the statement of facts and agreed facts that the property in question is not such property as the religious society may own under Section 934, Code of 1906 (Sec. 4110 Hemingway's Code)."

"It is the contention of the appellee that Section 4252, Code of 1906 (Section 6883 Hemingway's Code), and Section 934, Code of 1906 (Section 4110, Hemingway's Code), are to be construed together, and when so construed that the exemption will be defeated; that the exemption contemplated by Section 4252, Code of 1906, is of property as the church may rightfully hold under Section 934, Code of 1906.

"The appellants contend that Section 934, Code of 1906, does not modify or limit the exemption contained in Section 4252, Code of 1906.

"We have carefully considered the question involved and have only found one case directly in point, which is the case of Children's House, at **Atlantic City v. Atlantic City**, 68 N. J. Law, 385, 53 Atl. 399, 59 L. R. A. 947, which holds that property held beyond the power conferred by law is not exempt from taxation. We think this principle is sound, that it never was the purpose of the legislature to exempt from taxation any more property than a religious society could lawfully hold. The property involved here is in excess of the amount of property which a religious society can hold, and it cannot be heard to claim an exemption from taxation, in the court of equity, of property which it holds in violation of public policy and the laws of the land.

"The chancellor held in accordance with these views, and the judgment will be affirmed."

The doctrine was affirmed **Gunter v. City of Jackson**, 94 So. 842, 130 Miss. p. 637.



It is perfectly clear that the Legislature of the State of Mississippi did not intend to exempt from taxation all property of every kind which plaintiff in error might acquire, if it was entitled to acquire any further property than that specifically permitted. If so, it would have been easy to say so, and there was no occasion to designate any particular lands which should be exempt from taxation. The fact, however, that certain lands were exempted from taxation, and such lands as exempted included the only lands plaintiff in error was specifically authorized to acquire and own, creates an incontrovertible inference that the Legislature did not intend that it should hold if at all other lands free from taxation. The term "**expressio unius est exclusio alterius**" applies.

In the case of **Columbia Railway Company v. South Carolina**, 261 U. S. 236, 67 L. Ed. 629, will be found a very clear-cut illustration of what is meant by the expression. In that case the Legislature of South Carolina incorporated a Canal Company, vesting it with title to certain property, and charging it with the duty of constructing a canal. The charter contained a provision requiring it to construct the canal to Gervais Street, and expressly provided for a forfeiture of the property and a reversion thereof to the State upon the failure to do so. The charter further required a construction of the canal to the Congaree section of the canal within a limited period, without any provision as to forfeiture. A reversion of the title to the state was asserted by reason of the failure to construct the canal as last above mentioned.

This Court applies the doctrine of **expressio unius est exclusio alterius** in the following language:

"Not only does the statute contain no positive terms creating, or words requiring the provision in question to be construed as a condition subsequent, but the clear implication is to the contrary. The clause relating to the

section of the canal down to Gervais Street is expressly that, upon failure to complete in seven years, the property shall revert to the state. In contrast, it is significant that no forfeiture is specifically prescribed with respect to the non-completion of the Congaree section of the canal. If this requirement, nevertheless, be construed as a condition subsequent, there can be no rational ground for holding that the other obligations of the contract are not susceptible of a like construction. Among these obligations is that requiring the completion of the canal to Gervais Street in two years; but the express provision for a forfeiture for failure to complete it in seven years negatives, as a matter of logical necessity, any suggestion that a forfeiture would be incurred for a failure to complete in two years. The inference, as applied to the other obligations, including that now in question, while not so direct and obvious, is, nevertheless, one which naturally flows with the premises."

We direct the attention of the court to the statement contained in the opinion of the Supreme Court of the State of Mississippi, calling attention to the fact that in Section 1 the following provision is found, conferring upon the plaintiff in error authority for the establishment of an endowment "and contributions of money, or negotiable securities of every kind in and of the endowment of such college," which is almost conclusive that the legislature contemplated that the endowment would consist of such property.

The question has been foreclosed by previous decision of this court.

In the case of **Chicago Theological Seminary v. Illinois**, 188 U. S. 662, 47 L. Ed. 641, this court had under consideration a similar assignment of error. The plaintiff in error in that case claimed revenue producing property exempt from

taxation under Section 5 of its legislative charter, which was in the following language:

"Sec. 5. That the property, of whatever kind or description, belonging or appertaining to said seminary, shall be forever free and exempt from all taxation, for all purposes whatsoever."

The Supreme Court of Illinois construing the charter held that the exemption was only applicable to property used directly for school purposes. The charter was granted in 1855. The Constitution of Illinois in 1870 contained an exemption which had the effect of greatly restricting the exemption rights of educational institutions, and the legislature of the State of Illinois in 1872 restricted exempt property within even narrower limits than provided by the Constitution of 1870.

The restrictive provisions contained in the Constitution of Illinois of 1870, and the act of the Legislature of 1872, were set out in our discussion of the case of **Northwestern University v. People**, 99 U. S. 309, 25 L. Ed. 387, *supra*.

On writ of error this court took jurisdiction for the same reason that jurisdiction was taken in the case last above mentioned. That is to say, because it was asserted that the State Court of Illinois had given effect to the Constitution of 1870 and the act of the Legislature of 1872, which restricted the exemption of such institution. When this court, however, reached the question of a construction of the charter rights, it agreed with the Supreme Court of Illinois, using the following language:

"The reasoning of the Supreme Court of Illinois (174 Ill. 177, 51 N. E. 198), in refusing the exemption claimed, so far as relates to the property not connected with the seminary, is best stated in the language of the

opinion of that court. After stating the rule of construction, as above mentioned, the court said (p. 181, N. E., p. 109):

"If, however, taking the express words of the act, and without extending their meaning by implication, they may be held to include all property belonging or appertaining to the 'seminary' mentioned in the 2d. Section, or to include all the property belonging or appertaining to the corporation, and there is reasonable ground for doubt which was intended by the legislature, that doubt must be resolved in favor of the state. In other words, if the language is capable of a broad or more restricted meaning, the latter must be adopted. The 2nd. section of the charter mentioning certain property to be located in or near the city of Chicago, and which, is dominated 'the seminary,' we think the words in the 5th section, 'said seminary,' refer to that particular property, and to so hold seems to do no more than to give the language of the two sections their literal and ordinarily understood meaning. To say, as is contended by appellee, that 'said seminary' was intended to mean the corporation is to extend the meaning of those words by implication, which is not permissible.

"It is said that the only entity mentioned in the charter capable of owning property is the corporation, and therefore it could not have been intended that property belonging or appertaining to the seminary was meant by Sec. 5. We think this position is based upon a too limited meaning of the words 'belonging or appertaining,' as here used. Of course, if the language of Sec. 5 had been that the property, of whatever kind or description, owned by the said seminary shall be forever free from all taxation, etc., or if, as counsel seem to assume, the words 'belonging or appertaining' here necessarily meant ownership of the property, then there would be force in

this argument of counsel. It is undoubtedly true that the word 'belonging' may mean ownership, and very often does, but that is not its only meaning. Webster's International Dictionary defines it: '2. That which is connected with a principal or greater thing; an appendage, an appurtenance. He also defines the word 'pertain' as meaning 'to belong or pertain, whether by right of nature, appointment, or custom; to relate, as "things pertaining to life."' Manifestly, the purpose of Sec. 5 was to exempt property owned by the corporation, but it does not follow that the intention was to include in that exemption all property owned by it used for purposes of the school.'

"We think there is force in this reasoning, and we are disposed to concur in the result arrived at.

"It is contended by counsel for plaintiff in error that the words 'said seminary,' contained in Sec. 5 of the charter, referred to the corporation created by the act, and not to the school buildings and grounds, and that therefore, the exemption necessarily exempted from taxation all the property against which the judgments below were rendered."

The court also used the following language:

"The case of **Northwestern University v. Illinois**, 99 U. S. 309, 25 L. Ed. 387, is no authority for the construction contended for by the plaintiff in error. In that case the charter provided 'that all property, of whatever kind or description, belonging to or owned by the said corporation, shall be forever free from taxation for any and all purposes.' The difference between the two provisions is intrinsic and material. What is lacking in the case at bar is present in the case cited, namely, a provision exempting all the property 'owned by said corporation.' In the case before us it is the property 'belonging or ap-

pertaining to said seminary,' and the word 'belonging' is construed by the Supreme Court as not synonymous with 'owned by,' nor is the word 'seminary' regarded in this connection as the equivalent of the word 'corporation.'

"But the plaintiff in error contends that however correct the construction adopted by the state courts might be if founded upon general rules of construction pertaining to claims for exemption from taxation, it is plainly erroneous under the provision of Section 6 of the charter, providing that the act 'shall be deemed a public act, and shall be construed liberally in all courts for the purposes therein expressed.'

"To adopt the construction contended for by the plaintiff in error would call for a reversal of the rules otherwise prevailing in and governing claims for exemption from taxation. But it is nevertheless urged that if in any way the language of exemption can by a liberal construction be said to cover the whole property owned by the corporation, such construction must be adopted by reason of the provisions contained in Sec. 6. We think this is claiming entirely too much for the language of that section."

In addition to the foregoing, we might add that Section 5 of the charter provides for the exemption from taxation of certain lands, to-wit: (a) lands or grounds used as a cite and campus, with the buildings, etc., thereon. (b) and the endowment fund contributed to said college.

Not only is it true that the designation of certain lands as being exempt suggest almost conclusively the exclusion of other lands, especially where the lands designated exempted constitute or include all the lands which the corporation was expressly permitted to acquire or own, but Section 5 contains a further suggestion that the term "endowment fund" rather

strongly conveys the idea of the exemption of an endowment consisting of money or negotiable securities referred to in Section 1 of the charter.

It is not necessary to enter into a discussion as to whether the term "endowment" could include real estate. It is not necessary to convince the Court that the term "endowment fund" could not include real estate, but we do submit that in Section 5 the legislature having designated certain real estate as being exempt carrying with it the idea of the exclusion of other real estate, and providing for the exemption of the endowment fund, which appears from Section 1, to contemplate contribution of money and negotiable securities of every kind, we are with irresistible reason convinced of the correctness of the decision of the Supreme Court of the State of Mississippi in respect thereto.

Even if it be true, as contended by counsel for plaintiff in error, that the term "endowment fund" may include real estate, we submit that the decision of the Supreme Court of the State of Mississippi in this case construing the provisions of the particular charter in question cannot be said to be erroneous in reaching the conclusion which was reached.

The college contends for complete immunity from taxation, and that the state may not in any wise exact from these office buildings, utilized for profit in commerce, their equitable contribution to tax burden.

The fallacious contention of the College is that it may, under its endowment fund, enter into any form of business provided only it devotes the net return therefrom to the cause of education. But there is no guaranty of the receipt of a net from a business operated by the college. To preclude this commercialization, the endowment fund was limited to employment, specifically, in non-business enterprises, and

those connected with the college could not pursue their commercial ambitions free from state taxation. If the endowment fund was to compete in commerce, the requirement of the state was contribution to the common burden that made competition possible.

As laid down in **Y. & M. V. R. R. Co. v. Adams**, 180 U. S. 22, 45 L. Ed. 407, the rule in Mississippi is:

"Public policy in all these states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational, and municipal purposes; but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases, legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies."

"Art. 53. Any religious society or congregation or ecclesiastical body may hold, at any one place a house or tenement for a place of worship, with proper and reasonable ground thereto attached; a house or tenement as a place of residence for their pastor or minister with proper and reasonable ground thereto attached; a house or tenement to be appropriated and used as a male school or seminary of learning, with proper and sufficient ground thereto attached, and another house or tenement to be attached, and another house or tenement to be appropriated as a female school or seminary of learning, and a cemetery of sufficient dimensions, and no more. Pro



vided that any religious society or denomination may own such colleges or seminaries of learning as it may think proper if used for such purposes.

"Art. 54. All lands, tenements or hereditaments or any interest or benefit therein, or therefrom, except for the purposes, provided in the foregoing article, which may be given, granted, conveyed or leased, or released, to any religious denomination or congregation, either directly or indirectly, or in trust or confidence for the use or benefit of such society, either express or implied, or secret, or by the judgment of any court, or by way of lien, mortgage or pledge, shall be *ipso facto*, by such alienation forfeited to the state; nor shall such society, denomination or ecclesiastical body, by any act or ingenuity, appropriate, or have appropriated, to its use, for its benefit, or to its disposition, any present or future interest in lands, tenements, or hereditaments other than to the extent above mentioned, nor shall any such society evade this provision by any device or subterfuge in taking or holding more land for any of the purposes above mentioned than is necessary.

Therefore, beginning with 1857 (we have gone back no further), there was and still is a uniform policy, prohibiting religious organizations from owning realty other than for colleges or seminaries of learning, and as to these, there may be only "proper and reasonable grounds thereto attached." And then, when a denomination as a whole is vested with power to acquire land for colleges or seminaries of learning, a limitation is expressly made. **Maas. v. Sisters of Mercy**, 99 Sou., 468; **Blackbourn v. Tucker**, 72 Miss., 747; **Barton v. King**, 41 Miss., 288.

Opposite counsel produce many cases, but none from a state where the public policy is that of Mississippi, wherein

church ownership of realty, save in the most limited extent, is contrary to law.

With this fundamental policy, namely, the right for a church to own specific property, this charter must not be construed to overturn fundamentals, especially, when, contemporaneously these provisions of the Code of 1857 were, being embodied in the Constitution, at this date (1890).

#### **The charter provides:**

Section 1. Thereunder are named certain persons who are thereby specifically denominated "Members of the Church Conference . . . lay members of said church . . ." Thus, irrevocably tying into our public policy, with reference to church ownership of realty.

Under the charter, those persons "may accept donations of real and personal property for the benefit of the college hereafter to be established by them, and contributions of money or negotiable securities of every kind, in aid of the endowment of such college." We interpret this to limit the realty acquisition to that utilized by law and expressly permitted to be held, because as said, Section 1 is a declaration that all acts done or left undone must not be repugnant to the constitution and laws of Mississippi. "Not repugnant to the constitution and laws of this state."

Section 1072 was then in effect, and thereunder these office buildings could not be owned. Thereby churches might own certain property "and no more, such as was used for that purpose." What realty? That realty that the law authorized, and no other. This power to accept had to do with "the college hereafter to be established by them." It was confined thereto and went no further.

But admitting the right thus given by special act to violate the general law, this authorization as to realty was to be "for the benefit of the college hereafter to be established by them," and did not have to be with contributions of **money** or **negotiable** securities of every kind "in aid of the **endowment** of such college." This is governed by separate provision. The college has been long since established by these parties, and therefore this power to accept "donations of real and personal property" ceased when the college came into being, and therefore the power of these persons is now **existent**, having been exercised it became **functus officio**.

Again, the realty here authorized to be donated was to be accepted "for the benefit of the college," while that here sought to be owned is for the benefit of the "endowment fund" of the college. The first section, dealing specifically with the right as to "endowment fund" limited it to "contributions of money or negotiable securities of every kind, **in aid of the endowment** of such college." We disregard as not pertinent, the more obscure power, when the specific power is accurately admeasured, and clearly expressed, both here and elsewhere. **Harvey v. Johnson**, 111 Miss. 567.

Furthermore, and more important, here we have a specific utilization of the word "endowment" and that word is limited to "contributions of money or negotiable securities of every kind"—not securities of a general character, stocks, choses in action not negotiable, but only those which were "money or negotiable securities" under the law merchant. Note, also, the word "contribution" expressly referred to in Section V is here limited to personality of this peculiar species. This limitation expressly appears in the first section, and therefore, the corporation, with deference, had no power to accept a "contribution" or realty "in aid of the endowment" because the law giver said "personalty"—nay, not personalty, but personality of a specific character, with limited at

tributes. This must admeasure corporate acquisition in aid of the endowment.

Note that the realty acquisition was to be "for the benefit of the college hereafter to be established by them" as contradistinguished from "contributions of money or negotiable securities of every kind, in aid of the endowment of such college." The college was to be composed of grounds, and therefor realty might be given; of buildings, and therefor personalty was to be acquired and erected upon the realty; but when it came to "in aid of the endowment," for reasons of public policy, the limitation was specifically made to "money or negotiable securities of every kind," and referred to as a "contribution."

So, we have a legislative coordination of the endowment with the public policy existing for fifty years.

To authorize, as counsel would have us, the acquisition of this business block, we would have to strike from Section 1 the provision "and do and perform all other acts for the benefit of said institution and the promotion of its welfare, that are not repugnant to the Constitution and laws of this State." Let the court note the effect of the word, "other." This word therein refers back to the power of the acquisition of realty, and requires that it be squared with sections in the Code then existing—realty, as a part of the college to be thereon situated; personalty, for the endowment, limited to "money and negotiable securities,"—"contribution."

Mississippi's public policy was conserved by the Supreme Court, its keeper, so conserved, foreign definitions became meaningless when they involved a violation of our laws, especially when other definitions equally authoritative coordinate therewith. **Appeal of Wagner**, 11 Atl. (Penn.), 403 404 405; **State v. Lyon**, 32 New Jersey Law, 360; **State v. Croll**.

man, 38 New Jersey Law, 323; **Edwards v. Hall**, 55 Eng. Ch. 58, 43 Reprint, 1163.

This precise distinction exists in Minnesota, in **State v. Bishop Seabury Mission**, 90 Minn. (1903) 92. It was held:

"In most of the cases reported in the books from other states where this question has been considered, **real property alone has been involved; and by a practically unanimous voice it has been held that the exemption extends to and embraces such land and real property only as is necessary for, and in fact used in connection with, the institution.** But the language of the statutes of the different States providing for such exemptions varies, and the authorities generally are of but little assistance. Our Constitution exempts 'academies, colleges, universities, and all seminaries of learning,' and the language justifies, construing it in the light of conditions existing when the Constitution was framed, the contention that the privilege was intended to be extended to the institutions, and not to specific property, and to give it force and effect, it must be held to embrace **both real and personal property.** This is practically conceded by counsel for appellant, but he insists that the rule adopted by the court in respect to real property, viz., that only such property as is immediately connected with and used by the institution is exempt, should be applied as well to personal property; that, as the endowment fund is loaned out on farm and other security, the income only being devoted to sustaining the school, the general rule should be applied, and the fund taxed. While there is much force in this contention, we do not believe the spirit or purpose of the Constitution requires us to adopt it. It would be of little benefit to such institutions to exempt their buildings and at the same time tax the funds necessary for their support and continued existence, as, in the case at bar, at a rate exceeding three per cent.

"Endowments to colleges and seminaries of the class here under consideration are donated by benevolent persons in trust, the principal to remain intact, the income therefrom alone to be used in their support and maintenance. Such endowments, in the nature of things, become a part or portion of the institution. They constitute their means of support, and are as essential as libraries, furniture, and other personal property used by them. It is undoubtedly the first attempt in this state to tax such funds, it being generally understood that they are exempt. Such has been the belief of those whose generosity has prompted donations of the kind. If it were understood that such funds were taxable, and that over half and more of the income derived therefrom would be necessary to discharge the same, it would tend to discourage future contributions, and result in the detriment and irreparable injury of the educational interests of the state.

"It is clear to us—at least, we have no difficulty in holding—that the framers of the constitution did not anticipate such a condition of things, nor did they intend that the library, furniture, or tuition fee paid by students should be subject to taxation. If the fund realized from tuition comes within the exemption, no sound or logical reason occurs to us why the endowment should not also come within the benefits of the law. Both are indispensable in the maintenance of the institution, in the payment of its expenses. Of course, if such fund should be invested in real property, the immunity from taxation would cease, within the rule of the cases herein cited; but so long as it remains intact, and is used in connection with and for the support of the institution, it should be exempt from taxation. This may seem somewhat inconsistent with the rule as applied to real property, but it harmonizes with the best interests of such institutions, and the policy of the state in their encouragement, and we adopt it."

In the case of **Rosedale Seminary Association v. Linden**, 63 Atl. 904 (N. J.) 73 N. J. Law. 421, it was held that an exemption from taxation of the endowment or fund of any religious society, college, etc., did not include land.

The question was directly involved in the case of **Life Association v. Schilling** (Kan.) 120 Pac. 548, where the following language was used:

"The reserve or emergency fund of a life association was exempt from taxation under the Statute of Kansas. This association took \$20,000.00 in cash from its reserve fund, invested the same in an office building, which it used partly for its own purposes; the remainder was rented for revenue, the revenue being added to the reserve of the association. The court held that for taxation purposes, it ceased to be part of the fund, using the following language:

"The averment of a petition that this real estate 'is carried as a reserve' fund must relate to the matter of bookkeeping, which does not alter the fact that it is not an emergency fund at this time. It is true that the term 'fund' may, in a general sense, embrace property as well as money and securities, while held for the purposes from which the accumulation designated by that name was created, but property intended and used for an entirely different purpose, obtained by money deliberately and permanently withdrawn from the fund, with no purpose or thought of restoration, is not a part of the fund, at least, in any sense that can justify a claim of exemption from taxation. See also **Nat'l. Council v. Shawnee Co.** 63 Kan. 808. 66 Pac. 1014."

In the case of **Town of New London v. Colby** (N. H.) 46 Atl. 743, the court used the following language:

"If the intent had been, as claimed by the defendant, to except all the real estate of such institutions, it is probable that the intent would have been more definitely expressed, especially in view of the fact that the other real estate excepted is described with definiteness." The grant of exemption contained the following language, "actually for the use and solely for the benefit of said institution."

"The court held that the exemption did not include real estate leased for revenue, although the income therefrom was devoted to educational purposes. The court held that the property was not exempt."

See, also, **Odd Fellows v. Redus**, 78 Miss. 352.

In dealing with the question as to what is meant by the term "endowment fund" counsel for plaintiff in error cite the case of **State v. Railroad Company**, 51 Miss. 361, and from an examination of the case it is perfectly evident that the term "fund" used in the act of Congress referred to proceeds arising from the sale of certain lands, and was applicable to personal property.

In the case of **Brown University v. Granger**, (R. I. 36 L. R. A. (ns) 847, cited by counsel for plaintiff in error, page 41, holds nothing more than that real estate may become part of the endowment of a college.

The case of **Webster City v. Wright (Iowa)** 24 L. R. A. (NS) 1205, the case turned on the construction of certain provisions in an Iowa Statute, and is without value.

The same may be said of **Ellsworth College v. Emmet County (Iowa)** 42 L. R. A. (NS) 530.

The case of **McElwain v. Gifford (Ind.)** 65 N. E. 576, cited was a case where the University endowment fund held



a mortgage covering certain lands in the State of Indiana. The mortgage was foreclosed and the land purchased by a third person. The Supreme Court of Indiana held that the purchaser acquired an absolute title to the property.

In that case it was the mortgage on the land, and not the land itself which formed part of the University endowment fund.

The case of **Yale University v. New Haven**, 71 Conn. 316, 43 L. R. A. 490, cited by plaintiff in error bears no relation whatever to the present case.

#### **We revert to the analysis of the charter.**

This instrument must be construed as a whole, Sections 1 to 7, both inclusive.

Note "contribution," but when we refer the court to a specific utilization in the charter where only personalty is embraced, that strengthens our position. The Legislature was jealous of this corporation's power, because personalty in the endowment was not allowed freely to be accepted. It could not own **shares of stock**, for thereby it might control profit producing corporations, but only **negotiable securities**; restriction in property domination was the legislative admeasurement of the public welfare under this charter.

The Legislature was conscious of the fixed public policy with which this charter must be coordinated. Where the Legislature has one place specifically and definitely made a declaration of a fixed policy, conjectural interpretation of the statute will not be allowed to upset it. **Harvey v. Johnson**, 111 Miss. 567. Hence, under Section 1, no realty could be acquired other than for the establishment of the college "as a building site and campus." This is demonstrable by the words themselves. "college hereafter to be established

by them "college," "building site" and campus does not embrace a business block.

Therefore, Section 1, even if construable as counsel would have it, would violate the law, and counsel must needs therefore construe it so that the law will not be violated. What could be more detrimental than to violate the law in realty acquisition in an educational institution for the young who thereby would be taught disrespect for law. Opposite counsel overlook this limitation "not repugnant to the Constitution and Laws of this State." This reaches back, controls, modifies all that goes before, and, if that be necessary, measures Section 1 by Section 468 and 1072, Code of 1880. It was always and is still unlawful to acquire this office building.

Section 2. Thereunder no person other than a member of the church could become eligible to trusteeship, thereby the church denomination was squarely yoked with the institution and provision made for its officers, and this section shows, conclusively, that the Legislature dealt therewith as a church—denominational—organization.

Section 3. Thereunder further provision was made for direct church, denominational, control for "vacancies shall be filled by said conferences in such way and at such time as they may determine and the persons so elected shall succeed to the office, place, jurisdiction and powers of the trustees whose terms of office have expired."

Then follows this declaration: "And the said corporation and college established by it shall be subject to the vicarial powers of said conferences at all times and the said college, its property and effects shall be the property of said church under the special patronage and jurisdiction of said conferences. There was no individuality, no corporate en-

tity, "Millsaps College;" it was a mere educational department of the Methodist Church in Mississippi whose property it always was and has been. Note: "The said college, its property and effects shall be the property of said church;" the church controlled as contra-distinguished from the college. **United States v. Redus Co.** 253 U. S. 62, 64 L. Ed. 781, **Chicago, etc. Co. v. Minneapolis, etc.** 247 U. S. 500 L. Ed. U. S. v. Delaware, etc., 238 U. S., 516, 59 L. Ed. 1438; **U. S. v. Lehigh v. R. Co.**, 220 U. S. 257, 273, 55; L. Ed. 458, 463. Where, as here, the corporation is dominated but by one owner, corporate existence exists but qualifiedly. **Millsaps v. Bank**, 71 Miss. 372.

Under **Gunter v. Jackson**, supra, and **Methodist Church v. Meridian**, supra, a holding of this character of realty by a church is illegal, and corporate existence never protects against violation of the law. **Southern Securities Co. v. State**, 91 Miss., 195; **United States v. Reading Co.**, 253 U. S. 62; **Chicago, etc., v. Minneapolis, etc.**, 247 U. S., 500, **Hunter v. Vehicle Works**, 190 Fed. 668; **Bethlehem Steel Co. v. Pile Co.**, 118 Atl. 285; **Kardo v. Adams**, 231 Fed. 967.

At the time of the acquisition of this property, there was in effect what is now Section 4110, of Hemingway's Code, by which it was provided:

"Any religious society or congregation or ecclesiastical body may hold and own, at any one place, the following real property, but no other, viz:

- (a) A house or tenement for a place of worship,
- (b) A house or tenement for a place of residence for its pastor or minister,
- (c) A house or tenement appropriated and used as a school or seminary of learning for males.

(d) And another house or tenement to be appropriated and used as a school or seminary of learning for females;

With a proper and reasonable quantity of ground, in each instance, thereto attached; and

(e) A cemetery of sufficient dimensions.

(f) Any religious denomination may, in addition, own such colleges or seminaries of learning as it may think proper; and

(g) A place of residence for its local clergyman in charge."

The right of ownership in the several churches precisely as pointed out in **Gunter v. Jackson**, supra, was denied where the Harding Building, a precisely similar piece of property, was adjudged to be unlawfully held by the Baptists in Mississippi and taxable by reason thereof, it being declared in the second **Gunter case**, at page 846:

"If such property and the revenues therefrom are primarily invested in trade or any other business for profit they are liable to taxes, even though the ultimate net income be devoted to the objects referred to in the statute."

For centuries, the English law—our law—has looked with hostility upon property vested in the dead hand of the church. Vouchsafe any sect much land and the segregation of church and state ceases. If the land owned was in excess of that authorized by charter, such excess was immediately forfeited. **State v. Lumber Company**, 106 Miss. 740.

Here, that sought to be authorized is as remarked by Mr. Justice Blackley, 81 Ga. 217 in **Massenberg v. Grand Lodge**

"The acquiring of money by the use of property or capital is not the appropriate office of a charitable agency, but rather to apply and administer that which has been accumulated through its own bounty or the bounty of others. It is not an instrumentality for gathering together, but for scattering abroad. When charity has a business side, let it conduct business as the world generally, on business principles, the first rule of which is to provide for taxes the highest claim on every species of property used in the common avocations of life."

So where as here that which the college could hold in its name had to be coordinated with that authorized to be held by a church business property was therefrom expressly excluded **Institution Case**, 1916 D. L. R. A 1173 (Ohio).

The preceding sections are treated as only operative to initiate the organization, but Section 4 provides:

"When organized as hereinbefore directed, shall be known by the **corporate name** set out in the first section of this act."

As at then, the operation of the organization, as an entity began, "and **all money, promissory notes and evidences of debt heretofore collected under the direction of said conferences for said college**, shall be turned over to and receipted for, by them."

The parties, seeking to organize to this point, had not sought to contravene the public policy of Mississippi and acquire realty, and did not bring to the attention of the legislature that there was any purpose on their part, to subvert what was well known.

As at that time authority was specifically asked to turn

over "personalty" of a specific character, "money, promissory notes and evidences of debt"—not even shares of stock or anything else. No provision is made for the delivery to the college of realty. Personalty of a peculiar character, is that which the college was to receive, and that for which they were required to receipt.

Note the particularity wherewith this provision is made, how the transfer is to become consummate and rights vouchsafed. Thereunder, they are to be "vested with the full legal title thereto," naught is said about the power to acquire "realty." Under this section, the charter is, at pains, to again declare that these parties "are authorized to sue," thus limiting and circumscribing Section 1, because the particularization of this power must be imputed to that theretofore recited. This particularization, to the extent mentioned, speaks volumes, because it shows how precise was the draftsman of this instrument in vesting in the church the requisite rights for recovery, and when so doing, naught was said of realty.

Note. "The said corporation"—not the trustees, "shall have the power to select any appropriate town, city or other place in this state at which to establish said college," thus vesting in them for the first time plenary power as to location.

The power to acquire realty was here dealt with, definitely and specifically. Organization must, therefore, have preceded prior to the investing of the rights under Section 4. When so then organized, what as to realty? "To purchase grounds." Note the phraseology "purchase"—not a donation, but for a valuable consideration. We call attention thereto, because, in order to vest in the college the right to take as a corporation, by donation the legislature thought it requisite to add to this power, a further power, thus "and may accept donations or grants of land for the site of said

institution." Mark, well, that the Legislature says they may "purchase" and by "purchase" specific connotation is fully implied. Now, after the power to purchase is granted, there is still this limitation, "not to exceed 100 acres." Why? The corporation was possessed of funds; with these funds lawfully held, it could make an investment in lands. But the Legislature said "no," and affixed as a limitation upon the right to purchase an express condition that the purchase was not to exceed 100 acres. Note the full effect thereof.

But the Legislature didn't stop there. This 100 acres, so thus to be purchased, must be "as a building site and campus." If the corporation had unlimited power to purchase realty, under Section 1, what was the necessity of conferring it again, and limiting it to 100 acres—conditioning it by its use, and prohibiting it from other enjoyment? Note how specific the power is, after this 100 acres is so allowed to be purchased, "they may erect thereon such buildings, dormitories and halls as they may think expedient and proper to subserve the purpose of their organization and the best interests of said institution." Hence, just as Section 1072, Code 1880, limited and circumscribed, so is this power limited and conditions, and hence, no intention existed to authorize a rule of exemption, differing with Section 1072.

So jealous was the Legislature, that, in order to authorize the invitation of propositions, an express further power was granted, and that was, as a donation, to accept land, "for the site of said institution." The individual or the community desiring the location of this college could not have offered a land **other than for the site of such institution**; its power **to take was circumscribed, conditioned**, thereby, if this donation had been proposed, the statute would thereby have been contravened. We challenge an explanation of this careful limiting of corporate power as to realty other than that thereunder the Legislature sought to conserve the public policy

then being adopted as the Constitution, and to exclude realty speculation.

Counsel cannot get away from Section 4; every step from organization to consummation is specifically prescribed with the minutest detail; no power to accept a business block is conferred. Note, thereunder no more than 100 acres could be acquired, either by **donation** or by **purchase**, and it could not be acquired in more than **one tract**, or for any purpose other than as **the site**. So specific was this power that it required the college "**to erect thereon such buildings, dormitories and halls** as they may think expedient." No power was vouchsafed to purchase that which was already **in esse**, but only that which was to become, by erection, a portion of the institution.

Suppose there had been **donated** 110 acres for the campus, these additional 10 acres are admittedly subject not only to taxation but to forfeiture. Now suppose that a portion of the campus was used, not as a building site and campus, but for the purpose of producing revenue and office building; that is to say, a part of the campus itself was to be made revenue producing, thereunder immediately it would become not only taxable but forfeitable as hereinafter demonstrated. Why, if an excess of one acre is illegally held and forfeitable, can the college hold a half million dollars' worth of city realty in no way connected with the institution? Why, if it rents a portion of its campus for commercial purposes and thereby forfeit it, shall it be permitted to rent or hold business blocks located at a distant point. That which prescribed the fundamental policy of Section 4 must control in the interpretation of the charter and any attempt to hold realty, otherwise than as a site, as therein limited, flaunts the law which was careful to admeasure the realty holding by the statutory provision then in effect, section 1072.



Section 5. This constitutes the basis of the alleged exemption sought. Thereunder consider: The "lands or grounds" . . . "shall be exempt" upon these precise conditions.

(a) Not to exceed "one hundred acres." Here there is a specific limitation of the lands holding accurately admeasured by Section 1072; that is, lands reasonably necessary for the college.

There is no exception or reservation upon this absolute limitation. The lands or grounds cannot exceed one hundred acres, and by express declaration must constitute a single tract. Why was the exemption granted as to one hundred acres specifically, if it was the intention to allow the ownership of realty to be unlimited in value?

(b) We fail to find in this charter a continuing power for land acquisition. In short, under Section 4, the date of the acquisition is coincident with its establishment, or prior thereto, and when exercised there is no right to a re-location, no right to extend the corporate holdings. Note that the power is to purchase grounds, not many times but once. **Lashly v. Railroad**, 73 Miss 360.

(c) To be exempt, these lands must be "used by the corporation," that is, Millsaps College, as an institution, must directly appropriate to those purposes specified in its charter, the lands whereon exemption is to be granted.

There is a direct limitation within the rule of **McCulloch v. Stone**, 64 Miss, 378, and other cases cited, prohibiting an exemption from lands other than those used by the college.

(d) But it does not stop there. They must be used "as a site and campus for said college." Should lands be used, though a part of the college campus, for commercial purposes,

then explicit direction is made for taxation, and, if the failure to use the grounds as a site for said college as to that expressly authorized to be acquired defeats the exemption, much more is it defeated, as to that which was wholly contrary to public policy for the college to acquire.

(c) But note how precise was the exemption "The buildings, halls, dormitories thereon erected." The principal element in value in the Millsaps building is not the land but the building, and by the express terms of its exemption only those "buildings, halls and dormitories" there erected are exempt. Express authority for their erection is vouchsafed by Section 4 and when erected, under Section 4 tax immunity attaches under Section 5. But the Millsaps Building is a building not, there erected, by the college but located within the city and built by another party. Only those buildings are exempt which are on the campus and which are erected by the college.

What was the necessity of specifying buildings, at all, if it were not to circumscribe those that were to be free from the tax burden. **Expressio unius est exclusio alterius**, and when "buildings, halls and dormitories" at a specific place are distinctly mentioned, then those at a different place, are distinctly excluded and of necessity taxed.

These considerations limit the endowment fund immunity to that which has been under Section 1 "contributions of money or negotiable securities of every kind in aid of the endowment of such College" and under Section 4 "money, promissory notes and evidence of debt heretofore collected," and then, with these, as that upon which the endowment may be built, we have the declaration that the "endowment fund" contributed is exempt. But land could not be contributed, because Section 1072 forbade it, and this has been in effect continuously since. An endowment fund must be all only that

which the law allows when its protection is sought by virtue, thereof to exempt from taxation. Note **Gunter v. Jackson**, *supra*—both cases; **Church v. Meridian**, *supra*.

(f) But counsel overlooks the concluding declaration "and no longer." That is, land or grounds used by the corporation as a site and campus and buildings, halls and dormitories there erected are exempt while utilized as and for the college, but "no longer." Utilization in commerce does not square with the provisions of Section 5 and destroys any exemption.

See Note 34 A. L. R., 659, collecting cases.

Especially **State v. Bishop Seabury Mission**, 90 Minn., (1903) 92, where precisely the same distinction is made between personality and realty, **State v. St. Barnabas Hospital**, 95 Minn., (1905), 489.

It is generally held, in accordance with **Church v. Milliken**, 148 Ky., 584:

"Business houses erected on the church lot and rented out are not exempt." (Bald Ours.)

**Orr v. Baker**, 4 Ind., 86; **Society v. Boston**, 90 N. E. 573; **Cemetery Co., v. Commonwealth**, 26 S. E. 208.

"That the personal property of cemetery companies is generally held liable to taxation under Constitutions and statutes which exempt their real estate is shown by the following cases: **Rosedale Cemetery Co., v. Linden**; 73 N. J. Law, 431, 63 Atl., 904; **Commonwealth v. Lexington Cemetery Co.**, 114 Ky., 165, 70 S. W., 280; **State v. Wilson**, 53 Md. 638; **State v. Casey**, 210 Mo., 235, 109 S. W. 1; **Milford v. County Comm.** 213 Mass. 162, 100 N. E. 60."

**Pulaaki Co. v. Church**, 86 Ark., 205; **Church v. Board**, 98 N. E. 277; **Church v. Madison**, 167 N. W. 278.

As said in **Union v. Taylor**, 24 L. R. A. (Pa.), 698:

"If the Women's Christian Association had carried on a bakery, meat shop or grocery, that the profits therefrom might make public charity—the lodging and boarding house—self supporting, the bakery and meat shop would not have been exempt from taxation, or if the Episcopal Academy had carried on a coal yard or school book store in conjunction with their school, to make it self supporting, the coal yard and book store would not have been exempt. In neither of the cases cited was the business outside of or disassociated from the charity. In each case it was so blended with the "purely public charity" that on its facts it was difficult to draw a distinction, and the exemption claimed was sustained by this court on the special facts. But we hold in this case that carrying on a **book store, or any business, for profit, subjects such business to taxation, even although the whole profit therefrom goes to the principal institution for purposes of 'purely public charity.'**"

See **Board v. Philadelphia**, 109 Atl. 664.

In **State v. Westervelt**, 45 Atl. 788 (N. J.), it is held:

"The fact that the profits of a commercial business are devoted to charity does not make the business itself a charitable one, nor is the place where the business is carried on, for that reason, used for charitable purposes."

**Alton Ry. Co., v. Alton**, 45 Atl. 95.

The rule is this strict—that where there is a building in the course of erection, intended for charitable purposes but not "actually used therefor," it is not exempt.

**Institute v. Fort Lee**, 77 Atl. 1035.

As said in **Institute v. Myers**, 1916 D. L. R. A. 1173 (Ohio):

"Impressed with the duty of interpreting this language reasonably and even liberally, and giving the fairest

and most reasonable construction allowable, we cannot extend it so broad a meaning as to grant the relief which the institute asks. The all but universal deliverances along the line have had the effect of confining the exemption to such property as is directly used and employed by the institution in the actual carrying on of the business of the charity. Perhaps the most thoughtful and best reasoned of the cases outside our immediate jurisdiction are to be found in Pennsylvania and Georgia, in both of which states the constitutional limitations on the subject of exemption from taxation are alike with ours, word for word. References is made to the cases of **American Sunday School Union v. Philadelphia** 161 Pa., 307, 23 L. R. A., 695, 29 Atl. 26, and Academy of **Richmond County v. Bohler**, 80 Ga., 159, 7 S. E., 633.

Under Section 1 there never was a right to violate the law because all acts were conditioned upon not being repugnant thereto, and yet under Section 5, it is admitted that the ownership does violate the law, unless the right is vested in an irrepealable exemption.

#### D. Land ownership may be regulated.

There was no right in this one church to exact that the legislature discriminate in a great public policy in its favor, and deny to the other churches that right of ownership which was, as counsel contends, vouchsafed to the Methodist Church through Section V. The right to acquire under Section I of the charter was limited by law, and the State could prohibit land ownership by the church when it saw fit.

In *Terrace v. Thompson*, 263 U. S., 217, 68 L. Ed. 275, Mr. Justice Butler said:

"And, while Congress has exclusive jurisdiction over immigration, naturalization, and the disposal of the public domain, each state, in the absence of any treaty provision

to the contrary, has power to deny to aliens the right to own land within its borders. **Hauenstein v. Lynham**, 100 U. S., 483, 484, 488, 25 L. Ed., 628-630; **Blythe v. Hinckley**, 180 U. S., 333, 340, 45 L. Ed. 557, 561, 21 Sup. Ct. Rep. 390. Mr. Justice Field, speaking for this court (**Phillips v. Moore**, 100 U. S. 208, 25 L. Ed. 603), said (page 212):

"By the common law, an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government." **Porterfield v. Webb**, 263 U. S. 225, 68 L. Ed. 278; **Crescent Cotton Oil Co. v. Mississippi**, 257 U. S., 137, 66 L. Ed. 166.

The elementary rule is stated in 11 C. J. 989, thus:

"The amount of property which a college or university may take or hold, is, however, often limited by its charter or by the statutes of the state," citing in re McGraw, 2 L. R. A. 387, note.

It will be remembered that this corporation is not the owner of the property, but under Section III "that the said college, its property and effects shall be the property of said Church." And, therefore, subject to regulations as such.

Under the Police Power it is competent for the State thus to regulate land ownership by a church, and by an ecclesiastical corporation, and when in 1909 Major R. W. Millsaps undertook to make this conveyance, the right so to do depended on the law then in effect, and thereunder general laws the church did not have a right to take, and there is no provision in its charter giving it the right to flaunt the public policy and the general statutes of Mississippi, but these laws of Mississippi and of the United States stand to admeasure and control the right of the college and church to acquire at all times.

(E) **Repeal of unexercised powers not unconstitutional.**

The point is well illustrated by **Pearsall v. Great Northern R. Co.**, 161, U. S., 646, 40 L. Ed., 838. There the charter of the Minneapolis & St. Cloud R. Co. provided that it might connect with any railroad running in the same direction, and "consolidate its capital stock or its property, road, or franchise with those of any other railroad." And whether this right "could be taken away a subsequent act inhibiting the consolidation, lease or purchase by any railroad of the stock, property or franchise of any parallel or competing line," was the great constitutional question raised.

At the date of the grant of this charter the right to acquire realty on the part of the Church as a part of the endowment fund—yet many years prior to the attempted grant to Millsaps College—the Church—the public policy of Mississippi forbade such acquisition by constitutional mandate. In fact, Millsaps sought, with deference, by reserving a life estate, to set at naught these constitutional prohibitions and to violate the policy of Mississippi by enjoying the property during his life and at his death vesting it in the dead hand of the Church. Constitution 1890, Sections 269, 270.

As said in **Thompson v. McLeod**, 73, So., 193, 112 Miss., 281.

So likewise in **Pollock v. Trust Co.**, 157 U. S. 558, 15 Sup. Ct. 680, 39 L. Ed. 811, the court, by its Chief Justice, well say that " \* \* \*

"Mr. Justice Patterson observed in **Hylton v. United States** 3 U. S., 13 Dall. 171, 1 L. Ed. 536, "Land independently of its produce, is of no value."

In the language of the distinguished Coke:

"What is land but the profits thereof?" **Co., Lt. 45.**

"A devise of the rents and profits or income of lands passes the land itself both at law and in equity." 1 Jarman on Wills (4th Ed.) 789, and cases cited."

Therefore, as Millsaps enjoyed this property up to this death, he was, under **Blackburn v. Tucker**, 72 Miss., 735, generous at the expense of his heirs. And the right so to be is not in any wise conceded in this cause, and was one of those interesting questions raised but not decided. Surely this court would ~~have~~ <sup>not</sup> determine that the college could acquire before it could determine that by reason of acquisition it was exempt. How the state court would decide this court could only guess and yet its decision on a purely local question would control here. There can be no jurisdiction with all these questions undecided by the State Supreme Court.

In short, the express provision under Section 1, that the things to be done would at all times comply with the law, could not have effect if the law could not be changed to coordinate with existing public welfare. This conditions the law, and conditioning, would give to the College no right which could be asserted contrary to the law.

As said in the **Pearshall Case**, *supra*,

"In **Tucker v. Ferguson**, 89 U. S. 22 Wall 527 (22 805) that a tax upon lands owned by a railway company, and not used nor necessary in working the road and in the exercise of its franchise, was not unlawful, though the charter had provided for a certain tax upon the railroad company and had enacted that such tax should be in lieu of all other taxes to be imposed within the state. See also **Western Wisconsin R. Co. v. Tempealeau County**, *Supra* 93, U. S., 595 (23 814) "

And then, after reviewing all of the cases up to that time, declares



"But where the charter authorizes the company in sweeping terms to do certain things which are necessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, **is within the control of the legislature and may be treated as a license, and may be revoked if a possible exercise of such power is found to conflict with the interests of the public.** As applicable to the case under consideration, we think it was competent for the legislature to declare that the power it had conferred upon the Minneapolis & St. Cloud Railway Company to consolidate its interest with those of other similar corporations should not be exercised, so far as applicable to parallel and competing lines, inasmuch as it is for the interest of the public that there should be competition between parallel roads. The legislature has the right to assume in this connection that neither road would reduce its tariff to a destructive of unprofitable figure, or to a point where either road would become valueless to its stockholders, and that the object of the act in question is to prevent such a combination between the two as would constitute a monopoly.

"When the act of 1865 was passed it was doubtless contemplated that the Minneapolis & St. Cloud Railway Company would desire to extend its road (although it is hardly possible to suppose that an extension to the Pacific coast was thought of at that time), and to build, purchase, or lease branch roads, which would serve as feeders to its main line, and open up railway communication with territory naturally tributary to St. Paul and other towns on the Mississippi River. Such anticipations were perfectly legitimate, and these broad powers were undoubtedly intended, as an encouragement to the construction of railways, to the development of the vast, unoccupied, but fertile, territory stretching in both directions from the course of the Mississippi river, and also to a connection

with the fertile wheat growing section of Manitoba, by a branch road to the Canadian line. Had it occurred to the legislature at that time that these almost unlimited powers would be used to obtain the control of parallel and competing lines, and to stifle legitimate competition, doubtless a provision would have been inserted to meet this possibility. That the charter of 1865 might be made available to accomplish this purpose became apparent so that, within nine years thereafter, and before the construction of the road had been fairly entered upon, the legislature declared, in its act of March 9, 1874, that no railroad corporation should consolidate with, lease, purchase, or control any parallel or competing line; and to indicate still more clearly that its object was only to prevent the abuse of these powers by the creation of a monopoly, it passed another act, in 1881, repeating this prohibition, and further declaring that any railroad corporation, whether organized under general law or special charter, might consolidate with, lease, purchase, or in any way become the owner of, or control, or hold the stock of any other railroad corporation, when the respective roads could be lawfully connected and operated together, so as to constitute one continuous main line, with or without branches.

"We do not deem it necessary to express an opinion in this case whether the legislature could wholly revoke the power it had given to this company to extend its system by the construction or purchase of branch lines or feeders, since the possibility of an extension of the road, even to the Pacific Coast, may have had an influence upon persons contemplating the purchase of its stocks or securities so that a right to do this might be said to have become vested. But we think it was competent for the legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies.

In short, we cannot recognize a vested right to do a manifest wrong."

This right, assuming it to be permissible to acquire all character of land when it was originally made, was but a license which was not executed until long after the Constitution of 1890 became operative. The acquisition of these particular properties was in direct contravention of the law and public welfare of Mississippi, in 1909 and this authorized the legislature to circumscribe, limit, ownership; the learned counsel for the plaintiff in error has not contended, in his suit, that the act, subsequently passed, let us admit, which limited land ownership and prohibited the acquisition of office buildings by a church, was in violation of the contract clause. Not having so claimed, this Court is not under an obligation to seek through the statutes of Mississippi and endeavor to find a violation of the Federal Constitution thereby.

**Y. & M. V. R. v. Adams, 180 U. S. 44, 45 L. Ed. 418.**

And this power to thus control land ownership, thus, does not vouchsafe to the College the right to own this land and the ownership being illegal, the right to an exemption from taxation could not attach, because the law never contemplated immunization of the property, the acquisition of which it forbade.

#### **CONSTRUCTION BY STATE SUPREME COURT CORRECT AND IN ACCORDANCE WITH PUBLIC POLICY OF THE STATE.**

We submit that the interpretation placed on the charter of plaintiff in error by the Supreme Court of the State of Mississippi is in entire accord with the public policy of the State, extending over a long period of time. It must be borne in mind that the State of Mississippi and the governmental subdivision thereof in order to raise revenue for their respective

governmental purposes, have, for the most part, looked to an ad valorem tax on land

It is part of the financial history of the state that the major portion of public revenues have since the organization of the state been derived from a direct tax on immovable property. We therefore, find that from an early period in its history the right of the state and its governmental subdivisions to tax land has not willingly been parted with

This policy finds expression in our general exemption laws, beginning with the Code of 1857, wherein exemptions to religious and education institutions were confined to land used **exclusively and directly for such purpose.**

The provision contained in the Code of 1857 has been reenacted in the various codifications of the statutory laws of the state, including the Code of 1906, without material change, reference to which is hereby made.

The necessity of the state and its governmental subdivisions looking to the direct tax on land for its revenue was well known to the Legislature of 1890, which incorporated plaintiff in error. The members of the legislature were familiar with the condition which gave rise to the litigation revealed in **Mississippi Mills v. Cook**, 56 Miss. 40, in which case the Supreme Court of the State of Mississippi held that an irrevocable exemption of the property of a corporation operating for profit was voided under the constitution of 1869. An analysis of that case evinces the indisposition of our lawmakers to grant an irrevocable exemption, especially where the same included land not directly and exclusively used for the purpose of a corporation.

The prevailing policy found expression in the case of **Lodge v. Reda**, 7 Miss. 352, 29 So. 161, wherein it was held

that land belonging to a charitable society was taxable if leased for profit, although the income therefrom was used for charitable purposes.

A case directly in point is that of **Stahl, County Treas. v. Kansas Educational Ass'n.** (Kan.) 38 Pac. 796:

The charter of the association contained the following exemption: "That all the property or funds, real, personal, or mixed, that may be received, held or appropriated by or for such association for the exclusive purpose of religion or education shall be forever exempt from taxation."

The question was presented as to whether or not it covered land leased for revenue, the income from which was devoted to the purposes of the association. The Supreme Court of Kansas, through Mr. Justice Brewer, held otherwise, using the following language:

"Mr. Justice Brewer, speaking for the Court, observed in the last case that, 'all property receives protection from the state. Every man is secured in the enjoyment of his own, no matter to what use he devotes it. This security and protection carry with them the corresponding obligation to support. It is an obligation which rests equally upon all. It may require military service in time of war or civil service in time of peace. It always requires pecuniary support. This is taxation. The obligation to pay taxes is co-extensive with the protection received. An exemption from taxation is a release from this obligation. It is the receiving of protection without contributing to the support of the authority which protects. It is an exception to a rule, and is justified and upheld upon the theory of peculiar benefits received by the state from the property exempted. Nevertheless, it is an exception, and they who claim under

an exception must show themselves within its terms.' **Vail v. Beach**, 10 Kan. 214. Within these and other similar decisions of this court, the provision in Section 6 of the charter, creating an exemption, must be construed strictly. All such laws are in derogation of equal rights. On the part of the association, it is insisted that although the real estate in Emporia is not actually occupied or used for the exclusive purposes of religion or education, yet, as to rents or profits that are applied exclusively for the purpose of education, the property is exempt. The contention is that the charter 'exempts all property of the association which has been received, or which is held or appropriated for religion or education, and that it is not necessary that it is used exclusively for the designated purposes.' This construction omits to give sufficient force to the following language of Section 6, viz: 'For the exclusive purposes of religion or education.' The property exempt from taxation must not only have been received, held or appropriated by or for the association, but it must be received, held or appropriated for the exclusive purposes of religion or education, only,—not for lease, investment or profit. When its real estate is rented to a tenant, or its funds invested in other property for profit, or loaned at interest, the property thus rented, or invested or loaned will be liable to taxation, as much as any other property that is rented or invested or loaned, no matter in whose hands it might be. **Cincinnati College v. State**, 19 O. 110. If it had been intended by the legislative assembly of the territory to exempt from taxation all of the property of the association, language would have been used in its charter as broad as that in that of the St. Anna's Asylum of the City of New Orleans. The charter of that institution exempts 'all the property, real and personal, belonging to the asylum.' **St. Anna's Asylum v. City of New Orleans**, 105 U. S. 362. If the legislative assembly of the territory had intended to exempt

from taxation the property of the association which was rented or invested with the intention of having the rents or profits applied to carry on its religious or educational work, it would have stated explicitly in its character, as in the *Home of the Friendless of the City of St. Louis*, 'that the property of the corporation shall be exempt from taxation.' **Home of the Friendless v. Rouse**, 8 Wall. 430. If we were to construe the charter of the association as exempting from taxation real estate occupied by a tenant, because the rents or profits are applied 'for the exclusive purposes of religion or education,' then, under its charter, the association could receive and hold large amounts of property which it might invest in business or loan at interest without any taxation thereon, if the profits or interest were applied to the designated purposes. If the association might do that, it could go further, and operate a bank, store or any other enterprise which it had obtained by devise or otherwise, if the profits were applied exclusively to the purposes of religion or education. Such, evidently, was not the intention of the legislative assembly of the territory. It was said in **Washburn College v. Commissioners of Shawnee Co.**, 8 Kan. 344, that 'the accumulation of large amounts of untaxed property by educational, charitable, religious and other institutions is contrary to the fundamental rule requiring an equal rate of assessment and taxation.

"The authorities upon the question are cited 50 L. R. A. N. S., 1199. While the question is not entirely unanimous, the citations reveal a fairly uniform policy prevailing in the various states of the Union to confine exemptions of land from taxes in favor of religious and educational institutions to such as is exclusively and directly used for such purpose.

"Counsel for plaintiff in error imputed discrimination by attempted citation of divers charters

"Primarily no one contract will control another, but the State of Mississippi has uniformly taxed, save where the property was actually used for the charitable or school purpose. **Grenada Collegiate Institute**, Laws 1884-882, was limited by Section 5 of its charter thus: 'That the said corporation shall have power to receive by donation or purchase, take and hold real and personal estate, and receive by subscription and otherwise, a capital stock of fifty thousand dollars.'"

Harper's Baptist College, to which reference is made, Laws 1890, 563, was a colored college located in the country near Gloster "on lands conveyed Nov. 28, 1888, by Max Kahn to said college. The specification of "all instruments of music, chemical apparatus, and all other appliances used in conducting said college in all of its departments" should properly limit the character of the realty exempt under the statutes hereinbefore quoted.

Counsel relies upon the charter of Old Myrtle Normal School, Laws of 1890, 584, but that exemption was of "All College, preparatory and society buildings, also furniture, apparatus, libraries, dormitories, campus and lands on which the same may be located, not exceeding twenty acres."

The Waynesboro Institute was exempt on property "so long as the same is used for school purposes."

The Bellefontaine exemption was to exempt only "so long as used exclusively for educational purposes." Laws 1899, 575.

The Hebron exemption extended to "the property known as Hebron School, together with all instruments of music, chemical and philosophical apparatus and other appliances, used in conducting the school in all of its departments." Laws 1895, 71.



The Pleasant Hill exemption was conditioned upon the property being "used for the purposes above mentioned." Laws 1890, 570.

The Pickens High School, Laws 1890, 561, exempted only the property of this corporation "actually used for the Pickens High School."

This embraces every exemption relied upon by counsel under the act of 1890. A large number of other schools were chartered at the same time and they received none other than the exemption granted by general law which conditioned exemption upon actual utilization, and, with the utmost deference, none of counsel's charters support his contention that an office building located away from the site of the institution was exempt from taxation.

We disregard the other references as too far away in time to be of service; but it is fair to assume that those granted in 1890 are typical.

So that when the State Supreme Court held that this charter did not exempt an office building from taxation, it but reiterated what has been fundamentally settled in Mississippi for many years.

This exemption, with the utmost deference, but for the general exemption of the State, would have been absolutely void under the Constitution of 1869. However, the Supreme Court pretermitted a decision upon that point and upon many others urged, and we, therefore, do not burden this court with these matters, but respectfully urge that the Supreme Court construe this charter correctly.

POINT 6 UNDER SECTIONS 13 AND 20, ARTICLE XII  
CONSTITUTION 1869, NO IRREPEALABLE EXEMPTION OF PROPERTY.

We do not believe that it will be necessary to decide this question presented to the Supreme Court and expressly left undecided by that tribunal. But before this Court can reverse, it must affirmatively have decided this contract was not constitutionally repealable by the Legislature of Mississippi.

Creation of this corporation was almost coexistent with the Constitutional Convention of 1890 wherein, by Section 178, the right to alter, amend and repeal was fundamentally integrated into every charter by the Constitution.

As early as 1857, it was expressly provided (p. 292, Code 1857):

"All charters granted under this Act, or by any Act of the Legislature, unless otherwise expressly repealed in the Act, may be repealed by the Legislature."

Long anterior to the acquisition of the property, the Supreme Court of Mississippi, in 1890, in **Attala County v. Kelly**, 68 Miss., 44, had declared:

"The most that can be claimed is that the Act allowed an exemption from taxation, and it is well settled that **EVEN WHEN THIS IS DONE BY A CHARTER IS IS REPEALABLE BY A SUBSEQUENT LEGISLATURE**. **Cook v. Mississippi Mills**, 36 Miss., 49."

The property sought was acquired with this as a settled judicial exposition of the repealability of charter exemptions.

The contention of the Plaintiff in Error is that the church owns the property, yet as a church, there exists an irrevocably protected privilege to acquire all realty of every kind and character, both urban and agricultural, unlimited in amount,

to be held throughout eternity, free from contribution to maintain the state.

Not only free, but so free as that the State in its sovereign capacity may not require of it a contribution—an irrepealable exemption to a special corporation by a special charter, to acquire an unlimited amount of realty utilizable at pleasure and for profit.

Under counsel's contention, a million acres of Delta land might be owned and farmed, and yet no tax paid, or half of the business property—all of it—in every municipality in Mississippi might be owned, dealt in, profited from, but free from taxation.

By Section 13, Constitution of 1869, "the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

Counsel in his brief quotes largely from the opinion of Judge Campbell, in **Miss. Mills v. Cook**, 56 Miss., 41, and points out as controlling the interpretation of the California Court in **People v. Coleman**, 4 Calif., 46 and **High v. Shoemaker**, 23 Calif., 463, but overlooks the insurmountable fact that Whitfield, J., in **Adams v. R. R. Co.**, 77 Miss., 287, (in which Judge Campbell was of counsel for Adams, State Revenue Agent) said

"The Constitution of California contains an identical provision, and in case of **People v. McCrary**, decided at January term, 1868, the Supreme Court of California announced the same construction held in Iowa and Alabama, expressly overruling early decisions to the contrary, just as we do here. The Constitutions of Arkansas and Florida contain similar provisions, and the Supreme Courts of those States announced the same construction

which we here announce. When, therefore, Sec. 13 of the Constitution of 1869 was adopted in this State, it was written in the organic law of our land, bringing with it the same meaning precisely, under well settled rules of construction, which it had in the State from which it came here; and the same construction was unanimously approved by the Supreme Court of the United States in March, 1885; April, 1893, and March, 1894, to-wit: **Louisville, etc. v. Palmes**, 109 U. S., 248 254, **St. Louis, etc. v. Berry**, 113 U. S., 475; **Schurz v. Cook**, 148 U. S., 408; **Keokuk v. Missouri**, 152 U. S., 303, 304, 310 312.

"In overruling this feature of the decision in **Mississippi Mills v. Cook**, therefore, we were announcing a rule of construction supported by four decisions of the United States Supreme Court, and by the decisions of five State Supreme Courts, as against a rule of construction announced in no case in this Union except **Mississippi Mills v. Cook**."

And, therefore, counsel, with deference, in quoting that portion of **Mississippi Mills v. Cook** specifically overruled, fails to note **Adams v. R. R. Co.**, *supra*, on this point.

Counsel then cites **St. Anna's Asylum v. Parker**, 109 La. 33 So., 613, as controlling; yet fails to inform the Court that in the **St. Anna's Asylum** case that when the property was acquired, its acquisition was lawful, and thereafter the statute seeking to tax was passed. But Chief Justice White, subsequently of the Supreme Court of the United States, decided this case in the Supreme Court of Louisiana, 31 La. Ann. 292, saying

"It is conceded on both sides that the property claimed as exempted is a fire proof cotton press, now rented and used as such, and in no manner directly used by the asylum, although the revenues thereof are applied to the

benevolent and charitable purposes of the corporation. Under this state of facts, we are of opinion that the ownership of the property by the corporation and the application by it of the revenues derived from the rent does not constitute the actual use covered by the exemption from taxation of property actually used for charitable purposes. We apprehend such exemption to apply to property directly used and not indirectly by the application of the rents which may result from it. These conditions are to accord with the jurisprudence of the state. Nearly twenty years ago this Court drew this distinction between property used by a charitable corporation, and property from which it derived revenue. **New Orleans v. Congregation Dispersed of Judah**, 12 A. 390. Subsequently, in **New Orleans v. Bank of Lafayette**, 27 A. 836, this Court held that Article 118 of the Constitution, giving power to the General Assembly to exempt property actually used for church, school, or charitable purposes, was enumerative and hence limitative, that all grants of exemption made after the adoption of this provision, all property not in terms covered by it, were void, and that all prior grants of exemption inconsistent therewith were repealed thereby unless protected by contract. In the enforcement of these conclusions in **City v. St. Patrick's Hall Assn.**, 28 A. 512, it was determined that property occupied by a charitable association for the execution of the purpose of its being might be constitutionally exempted by the General Assembly from taxation, but that an exemption of property belonging to a corporation and not used by it directly, but only used by applying the revenues received from it, was violative of the constitutional provision already referred to, and hence stricken with nullity. Under this settled jurisprudence there can be no doubt of the liability of the property in controversy unless removed from the general rule by some exception. Such exception is claimed as resulting from the charter

of the defendant corporation, by which it is contended that a charter was created divesting the state of all power to repeal the exemption claimed. The provision of the charter relied on is as follows: 'That the said corporation shall have the same exemption from taxation as was enacted in favor of the Orphan Boys' Asylum of New Orleans, by the act approved March 12, 1836.' The provision of the act referred to is as follows: 'That from and after the passage of this act, all the property, real and personal, belonging to the Orphan Boys' Asylum of New Orleans, be and the same is hereby exempted from all taxation, either by the State, parish or city in which it is situated, any law to the contrary, notwithstanding.' The mere existence of this statute would not alone entitle the property to exemption, for, as we have already seen, all statutory exemptions incompatible with the existing constitutional provisions have by it been repealed. The solitary question, therefore, is: was this exemption a contract of such a nature as to invest the corporation with such a right as to remove it from all subsequent legislative control? We think not, and in reaching this conclusion, we waive all controversy as to the power of the General Assembly to divest its successors of so essential an attribute of sovereignty as the power of taxation."

It is true this decision was reversed in the Supreme Court, 105 U. S. 6, due to the express verbiage contained in the charter of the asylum which did not violate the law at the date of the grant, and the case which counsel quotes arose in Louisiana subsequently to the decision of the Federal Supreme Court, and was, of necessity, precluded thereby. But that which was not decided was this:

If St. Anna's Asylum had been by the legislature, at the date of its charter, expressly prohibited from acquiring land, in the future, of this charter, and, contrary to the terms of

such prohibition, the Asylum had acquired such land, then the question before this court might have been decided by the Federal Supreme Court. But in Louisiana, ownership of this property at the date of its acquisition was absolutely lawful and in accord with the public policy of that State, and the only question is, was it taxable? The Louisiana Supreme Court held that it was; the Supreme Court of the United States held that it was not.

There, as counsel says, are but two States containing similar verbiage in their constitutions and each of these states has held that property of this character is taxable, and the legislature was powerless to contract it away.

As to Section 20, **Daily v. Swope**, 47 Miss., 367, held:

"Taxation as used in the 20th section, means such taxation as is imposed by the legislature for the uses of the state at large, or the county. The constitution of 1832 did not contain the restrictions contained in this section. The convention sought to devise a rule by which taxation, imposed for the general and ordinary expenses of the State, county and city administrations, should operate equally in all parts of the state.

Again, at page 286, the Court said

"Necessarily, a tax whether levied for state revenue or for a local object, must be uniform in the sense of being apportioned equally upon all property selected by the legislature or the delegated taxing authority for its application." If imposed upon real estate, it must be upon all real estate in the same situation and condition, so that the burden on each parcel will bear a proportion to every other."

It was not possible, therefore, for the legislature to contract that it would do that which the Constitution said it could not do.

No reservation was requisite. This declaration was prohibitive.

**Vasser v. George**, 47 Miss., 413, reiterated the declaration thus:

"The limitation upon the power in that section only applies and governs taxes levied for the usual, ordinary and general purposes of the State, county and incorporated city or town, and does not include special assessments for local objects for the purpose of ameliorating property and enhancing its value, and also contributing to the general convenience, health or welfare of the community."

It was next construed in **Gaines v. Coates**, 51 Miss. 338. There a corporation claimed the right to weigh cotton, independent of the city cotton weigher, under two clauses of its charter. Thereunder "the association claims a vested right to weigh cotton, and a contract with the state to that effect, excluding forever all right of repeal." And these two sections were not any broader than those relied on by the colleges, and therefore, the Court then said:

"But, upon these two sections, the courts were asked to hold, that the charter of the association grants a vested right which, in effect, amounts to an alienation of sovereignty. It must be to this extent available to defeat the claim of the complainant.

Then the Court reviewed many decisions, and it was held that the corporation must exercise its powers subservient to the general law, precisely as here Section 1072, Code 1880, must control.

In **Holberg v. Macon**, 55 Miss., 114, it was held that if this section applied at all to privilege taxes, uniformity as to those taxes was all that was requisite.



Next came **Mississippi Mills v. Cook**, 56 Miss., 40, the decision of which was proper, the opinion of which, extending beyond the decision, has been criticized and overruled in part by **R. R. v. Adams**, 77 Miss., 278.

The decision, viz: That the Act of 1872 was repealable and repealed by the Act of 1877, has never been questioned.

As said in **R. R. Co. v. Adams**, 77 Miss., 278, the Court is not bound by expressions in former opinions on points not decided. **State v. Tonella**, 70, Miss., 711; **S. P. Seale v. Lush**, 91 So., 389; **Cross v. Burke**, 146 U. S. 86.

The Mississippi Mills case presented a single question: Was its property other than "paid in capital stock . . . their machinery for manufacturing purposes, their manufactured goods, and the buildings in which their machinery is located, and the ground upon which buildings are situated, or which may be within the necessary enclosure around such buildings," taxable under the Constitution of 1869?

The Act of 1877 did not attempt to tax the manufacturing plant proper. **State v. Simmons**, 70 Miss., 485.

That which Cook, tax collector, did was to collect taxes upon property not used for manufacturing purposes. In **Mississippi Mills v. Cook**, certain things were conceded:

First, (brief of Harris & George, page 45)

"The legislature may favor particular enterprises or branches of industry by express exemption of the property employed in them from taxation, or by merely omitting it from the scheme of taxation . . . Hence Sect. 20 of Article 12 of the State Constitution has been held not to restrict the legislature in the exercise of the power to select the subjects of taxation from the mass of taxable prop-

erty, or to exempt from taxation property employed in particular enterprises of public importance."

The Attorney General admitted (brief, p. 48):

"Under Section 20, Article 12 of our State Constitution, taxation must be equal and uniform and advalorem. It does not require all property to be taxed. The Legislature may exempt property, either expressly or by not providing for its taxation."

Mr. Bridewell's brief was we assume, not in conflict with the admissions of his associate.

The statement of the case by Mr. Justice Campbell is:

"It is within the power of the legislature to grant to a corporation for pecuniary profit exemption from the taxation of its property, so as to free it from liability to be taxed during the time for which such immunity may have been granted!"

He deals, first, with Section 13 and holds:

"The import and purpose of Section 13 seems to have been to establish the condition of the property of all corporations for pecuniary profit as being subject to taxation, and to forbid the exemption of such property from the liability to be taxed, by placing the property of all corporations for pecuniary profit, the same as that of individuals, . . . completely within the legislative power for the purpose of taxation, subject to the twentieth section of the same article of the constitution, so that the Legislature may at all times impose taxes on the property of such corporations, just as it may on the property of individuals."

Again, on page 54, it is declared:

"If corporate property must be taxed the same as individual property, and the legislature cannot omit to tax it when it taxes individual property; if the constitutional provision is self-executing, and **per se** subjects corporate property to the same taxation as individual property, as held by the Courts of Iowa and Alabama, it is plain that the Legislature cannot thwart the constitutional requirement by the easy process of chartering corporations beyond the reach of the constitutional provision. If a corporation escapes taxation by virtue of a legislative act, it is not '**subject to taxation**,' whereas the Constitution says it shall be and thus a legislative act of incorporation is made to annual the Constitution. It is said that corporate property must be taxed when individual property is; but how can that be, if corporate property is secure in immunity from taxation by virtue of a legislative grant!"

The fundamental postulate is that the legislature could not contract away the taxing power.

The Court then declared:

"The fact that our Constitution does not contain a provision against irrevocable charters argues nothing against the foregoing view."

All that could have been decided in the **Mississippi Mills** case is: That there could be no irrevocable exemption.

Thereupon, Judge Campbell deals with the Constitution of Missouri, and seeks to follow certain cases therein enumerated, but note **Washington University v. Rouse**, 42, Mo., 326, it is said:

"No importance or weight can be attached to that provision of the charter of defendant in error which excludes from the operation of the seventh section of the General Law in relation to corporations. It is incompetent, as before observed, for one Legislature to attempt to derogate from the power, or tie up the hands of a subsequent Legislature. For an irrevocable contract of the charter here possessed, no authority or precedent is to be found. Whilst the exemption continued, the property was free from taxation; but when the law was repealed, it then fell back in the general mass—liable, like all other property, to the burdens of government. It has been truly said that, 'in a representative democracy, the right of taxing the citizen is a separable incident of popular sovereignty. And this right must be preserved unimpaired in order that the revenue and burdens necessary to support the government be not unequally distributed, or onerously imposed on any particular class. The rights and obligations of the citizen and the government are mutual, and correlated; the one owes the duty of allegiance, the other of protection. Whilst protection is held out and extended the necessary support for the government must be furnished. Giving away the taxing power in perpetuity inevitably tends to the destruction of the state. If ten millions can be released in one day, one hundred millions may be released in another; and the principle being once established, the person might go on until every source of revenue was gone. Although the taxing power is but incidental one to be exercised as the means of performing governmental function, it is nevertheless a branch of the legislative power, which always, in its nature, implies not only the power of making the law, but of altering and repealing them when the exigencies of the State and circumstances of the time may require. **Rutherford Institution of National Law, Book 3, Chapter 3, Section 3** )

"When the charter of the University was granted, the legislature might have considered it reasonable to fust

er and encourage it in its infancy, and confer upon it privileges and immunities while struggling into existence. But no provisions was made in express terms, or by reasonable intendment, that those immunities should be perpetual, and have the effect of withdrawing millions of subsequently acquired property from taxation. In 1853, taxes were light, and the state debts were small, and exemptions could be made without great detriment. After that period, the state was involved in a false and ruinous system of loaning its credit to corporations by which it incurred immense debt; then followed the civil war, which increased the already burdensome obligations, and taxation became exceedingly onerous.

"In this condition of things, it was deemed the part of wisdom to make all property within the jurisdiction of the State, receiving the benefit of her laws and protection, contribute its proper proportion, and share the common burden. This was entirely a matter resting in the sound discretion of the legislative branch of the Government, and we have been unable to find any objection to that exercise of the power."

This, it will be perceived, dealt with the abstract right of a legislature, without any prohibition in the Constitution, to take away the right of subsequent legislatures. Now when there is put into the Constitution a provision similar to Section 20, the only way to give effect to that provision is to make all property therein taxable in proportion to its value. **If it is not taxable in proportion to its value**, the Legislature has attempted to do, and has done, that which the people said might be done.

In the **Washington case**, 8 Wall., 443, 19 L. Ed., 500, there was a dissent by Miller, Field and Chase, and in that dissent they declared:

"We do not believe that any legislative body, sitting under a State Constitution of the usual character, has a

right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs, or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of this existence. To hold, then, that any one of the annual Legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful.

"It cannot be maintained that this power to bargain away, for an unlimited time, the right of taxation, if it exists at all, is limited in reference to the subjects of taxation. In all the discussion of this question, in this court and elsewhere, no such limitation has been claimed. If the Legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations. And no hindrance can be seen in the principle adopted by the court, to rich corporations, as railroads and express companies or rich men, making contracts with the Legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from all burdens of supporting the government.

"The result of such a principle, under the growing tendency to special and partial legislation, would be, to exempt the rich from taxation, and cast all the burden of the support of government, and the payments of its debts, on those who are too poor or too honest to purchase such immunity."

This was independent of Section 20, and to give effect to Section 20 there must be this paramount right in the city to tax, as was here done.

But this charter contains no prohibition against profitable operation even of the College itself. **City of Jackson v. Preston**, 93 Miss., 377, expressly recognizes potential profit therefrom.

But not only may there be a profit arising from this educational venture, but this corporation is operating the Millsaps Building for profit; holds it as any other land owner would in the hope that it will appreciate in value and can then be disposed of.

In short, every morning this building must be cleaned; its elevators must be operated; its rents must be collected; it must be kept in repair, and all of this done for a profit.

If Millsaps College may own this business block, then it may operate for a profit a Delta farm; and when it seeks to profit from a commercial enterprise, common honesty decrees that as a fixed charge it assume its portion of the common burden. **Gunter v. City of Jackson**, *supra*.

In **Monday v. Van Hoose**, 30 S. E. 585, among other things it is said:

"If it competes in the common business and occupations of life with the property of other owners, it must bear the taxes which others bear. Thus if even a synagogue or a church were rented out during the week for a store house or a shop, though divine service might be performed in it on Saturday or Sunday, and though the rents were appropriated to religious or charitable uses, its exemption would be lost. **Smith v. Board of Review**, 136, N. E. 787."

In **State v. New Brunswick** 35 Atl., 853, real estate leased is not exempt from taxation.

See, also, **State ex rel Assessors**, 26 So. 876.

Millsaps College, therefore, can make a profit from its education, and it does make a profit from its utilization of this property here sought to be taxed, and when Section 5 of the charter was passed, both under Section 13 and Section 20, a corporation was brought into being authorized to operate for pecuniary profit.

The fact that it does not make a profit from its business operations, does not in any way confer upon the Legislature the right to do that which the Constitution prohibited.

In **Tucker v. Ferguson**, 22 Wall. 575, 22 L. Ed. 816, it is said:

"The provision of the 37th section of the Act of 1871, exempting the lands specified from local taxation until three years from the first of April, 1871, which period has not elapsed, was not a contract. There was no consideration. The company was required to do nothing and did nothing in return. As between individuals the stipulation would belong to the category of **nude pacts**. It has no higher character because one of the parties was a State, the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity spontaneously made, which might be kept, changed or recalled at pleasure. The case of **Christ Ch. Hospital v. Philadelphia Co.**, 24 How. 301, 16 L. Ed. 604, is instructive upon this subject. In 1833 the Legislature of Pennsylvania passed an Act declaring 'that the real property, including ground rents, now belonging to Christ Church Hospital, in the City of Philadelphia, so long as the same shall continue to belong to said hospital, shall be and remain free



from taxes.' In 1853 a law was passed which subjected the ground rents to taxation. The Supreme Court of the State sustained the validity of the latter Act. The hospital removed the case, by a writ of error under the 25th Section of the Judiciary Act of 1789, to this court. Here it was insisted that the Act of 1833 was a contract in perpetuity, and the contract clause of the Constitution of the United States was invoked for its protection. This court unanimously affirmed the judgment of the Supreme Court of the State.

"The taxing power is vital to the functions of government. It helps to sustain the social compact and give it efficacy. It is intended to promote the general welfare. It reaches the interest of every member of the community. It may be retained by contract in special cases for the public good, where such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it is to exist it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all. **Bk. v. Billings**, 4 Pet. 561; **R. Co. v. Maryland**, 10 How. 393; **Bk. v. Skelly**, 1 Black, 447; 17 L. Ed. 179; **R. Tax**, 18 Wall., 225, 21 L. Ed., 894."

See, also, **Wisconsin Ry. Co. v. County**, 93 U. S., 595, 23 L. Ed., 814, followed in **Pearsall v. R. R. Co.**, *supra*.

As was said in **Jackson v. Mississippi Fire Insurance Co.**, 95 So., 848.

"In **Adams v. Railroad Co.**, 77 Miss., 194, 24 So. 200, 60 L. R. A., 33, in holding a special exemption from taxation granted to a corporation to be void under a provi-

sion of the Constitution of 1869 similar to the one here under consideration, the court among other things said:

"If property of a particular kind is subjected to taxation, and owned by a corporation, it must bear the rate of taxation imposed on individuals. While the Constitution inhibits the exemption or discrimination in favor of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burden, which is natural and right and equity, is secured alike to the corporation and to the citizen."

"This holding was approved and followed in **Harrison County v. Gulf Coast Military Academy**, 126 Miss. 729, 89 So. 617. That the statute exempts the property of corporations and associations only from taxation does not render it repugnant to Section 181. No individual can engage in the insurance business in this state, as hereinbefore pointed out; consequently the statute does not exempt property of corporations from taxation, and leave that of individuals similarly situated subject there to."

The Legislature could not contract to exempt this property of the Methodist Church by a special charter to a special corporation when it taxed on almost the opposite corner the precisely similar property owned by the Baptist Church in the Harding Building. All business blocks in Jackson must be taxed.

Dissenting opinions had best be suppressed and individual opinions expressed cannot in many cases do more than confuse.

In the opinion of the Court in **Mississippi Mills** case, nothing, very properly, is said as to the power of exemption of a corporation similar to that here in question, and Chief

Justice Simrall, by his **arguendo statements** has mirrored the fundamental postulate that where property of a certain class is taxed, all property of that class must be taxed, and he is at pains to say that the right to contract away ~~the~~ power to tax should not have been held valid by the Federal Supreme Court, declaring:

"The State Courts have not cheerfully yielded their assent to this doctrine. The time, perhaps, will come when the Supreme Court of the United States will recede from it. The necessity of the preservation of the taxing power in its integrity had, perhaps, much to do in the adoption of the thirteenth section. It is wiser and safer, when we consider that the State lives on, after successive generations have passed away, to leave to each Legislature, in time to come, to judge for itself upon what persons and things taxes shall be laid, rather than that a Legislature of today may declare that certain property, belonging to certain owners, and future accumulations to it, shall for a long term of years, or forever, be exempt from such impositions."

With deference, the correct rule, binding upon the Legislature, is declared in **Hawkins v. Mangum**, 78 Miss. 107, reaffirming **Daily v. Swope** and **Vassar v. George**, *supra*.

The great case of **Railroad Company v. Adams**, 77 Miss. 294, specifically held that a corporation of this character, engaged in business, must needs be taxed, and we do not quote that opinion herein because to excerpt it would be to mar its symmetry; the learned Circuit Judge thereon relied and his reliance was not vain.

**Adams v. Tombigbee Mills**, 78 Miss. 677, held that there could be a general exemption, but not a particular exemption to a particular corporation by a particular charter.

Of Section 20, at page 10 of their brief, counsel frankly declare: "The next clause of the section—'All property shall be taxed in proportion to its value to be ascertained as provided by law'—we confess would give us more difficulty if it had not already been set at rest by every opinion of the Supreme Court that has touched upon the subject since the Constitution of 1869 was adopted, there not being recorded even a dissenting opinion to the view that this clause does not acquire that all property in the state shall be taxed but only that all property that is taxed shall be taxed in proportion to its value." Counsel's declaration "all property that is taxed shall be taxed in proportion to its value" ends this case. The Harding Building, belonging to the Baptist Church, is taxed, every other business block in Jackson is taxed, and that character of property, whereof the Millsaps Building is an outstanding example, being taxed, it, too, must be taxed. *Note Adams v. Kuykendall*, 83 Miss., 571, 35 So. 831:

"It is also familiar learning that, under the constitution of 1869, it was uniformly held that the subjects of taxation might be classified at the discretion of the legislature. A reference to the following authorities will show the gradual evolution of that doctrine: *Dally v. Swops*, *supra*; *Vassar v. George*, *supra*; *Mississippi Mills v. Cook*, 56 Miss. 40; *Bank v. Worrell*, 67 Miss. 47, and later cases. But it must, also, be noted that each of these cases held further that there could be no discrimination between property of the same class. The classification of property for purposes of taxation, when upheld as not violative of the constitutional provision, is always coupled with the proviso, 'if all of the same class are taxed alike.' In that case, the court further said:

"Section 31 of the charter of the city of Vicksburg directs that all debts due any person, including in this general term all notes, mortgages, trust deeds—in short, all

solvent credits, secured or unsecured—'shall be assessed and listed for taxation at the fair and full worth and market value of the same,' and then exempts notes representing purchase price of property from taxation. This is not a 'classification of property,' according to our understanding of the meaning of the term. Vendor's lien notes are simply solvent credits, belonging to the same class, possessing similar characteristics, and differing neither in kind nor use. To our mind it is manifest that the constitutional rule of uniformity has been ignored in the discrimination made between different kinds of solvent credits mentioned in the charter. Take a common occurrence as an illustration: A man purchases a lot with the intention of building a house. A portion of the purchase price is represented by vendor's lien notes, and, to secure money to erect a house he executes a junior mortgage. Upon no principle of equity, justice, or right can the former solvent credit be exempted while the latter is taxed. From the evidence of the debts themselves, from the manner in which, by operation of law, they are secured and their payments insured, vendor's lien notes are among the safest, and consequently most valuable, of the great class of solvent credits, and yet the holder of this kind is alone singled out to be the recipient of legislative favor. There is no sound reason why bills and notes given for purchase of property, and carrying with them a lien to enforce the payment, should be exempted from taxes, while other promissory notes and solvent credits of every kind and description, secured and unsecured, are subjected. To allow, a tax law to select certain articles of property, and taking them from the general class to which they belong, exempt them from the uniform operation of the law, would be to permit discrimination of the most invidious character. Such favoritism could make no pretense of equality. It would lack the semblance of legitimate tax legislation. **Cooley on Taxation** (2d Ed.), p. 215. It was no

more in the province of the legislature to assess solvent credits, except purchase money notes, than it would be to assess all houses except those used as banks, or all lots except those on which hotels are built, or all stock of goods except liquors, or dry goods, or groceries, or to make any other capricious subdivision of any one of the numerous classes of taxable property. It should be observed that this exception is not based upon or supported by the reasoning which has occasionally induced legislatures of a few states to exempt from taxation horses of a specified breed, cows used solely for dairy purposes, lands devoted exclusively to the cultivation of a special crop, like sugar beet or ramie, and other similar exemptions. These are founded upon grounds of public policy, on the theory that they tend to encourage and develop favored 'infant industries, which, it is thought, will conduce to the benefit of the state as a whole. As to the wisdom of such exemptions and so-called 'classifications' the courts have no right to speak, and their validity depends on the wording of the constitutions of the states in which they are created, but the reasoning which prompts them has no application to the case at bar, and even in these instances all of each 'class' is treated alike.

"We conclude that the exemption from taxation of purchase money notes attempted to be granted by Section 31 of the charter of Vicksburg cannot be upheld as a legislative classification of property for purposes of taxation, but that it is void, as being in contravention of Artl. 12, Sec. 20, Constitution 1869. As this obviates the necessity of any extended reply to the arguments as to the application of certain sections of the constitution of 1890, we content ourselves with stating that the question under our present constitution is free from difficulty, as the self-executing mandate of Sec. 112 of that instrument does not permit the legislature to classify property for taxation except as therein expressly stated. **I. C. R. Co v. Ihlenberg.**

75 Fed. 873, 21 C. C. A. 546, 34 L. R. A. 393; **Adams v. Bank of Oxford**, 78 Miss., 532, 29 So. 402."

Can an office building, used and rented for revenue, be made exempt from taxation when it was expressly declared "it was no more in the province of the legislature to assess solvent credits, except purchase money notes, than it would be to assess all houses except those used as banks, or all lots except those on which hotels are built," etc. And what is the difference between this office building and the Harding Building? Both are office buildings, both rented for revenue purposes, and equally subject to the State taxation under Sec. 20, Art. 12, of the Constitution of 1869. "All property" embraces this property. This is not the case of a piece of property used as a church, or as a cemetery, or as a school; it is the case of a piece of property used in business, for business, with the object in view of utilizing the returns for profit, and then devoting the proceeds of this business conducted for profit to the purpose of the promotion of education.

Millsaps College, as landlord, contracts with the Jackson-State National Bank, as tenant, in business, for business purposes, and to make a profit for its corporation. This corporation is authorized, if appellant is correct, to own the Jackson Bank Building, and it is authorized to traffic and trade with its tenants for its own aggrandizement as completely as is any other landlord, and in and about so trafficking, it seeks to gain from the business done precisely the same profit as other landlords seek, but after having obtained this profit, instead of doing as other landlords do, it voluntarily devotes the return to an educational purpose. It does business just as effectually as any other corporation and in doing business, it is actuated by precisely the same impulses that actuate all other corporations, and its ability to do business is enhanced to the extent of an assessment of 5 per cent which it can under sell its space to a tenant and yet make a profit in the doing of that which

to the other would be but the return of cost. In short, if this corporation has the right to do business without expense of taxes—which constitute the heaviest single cost item at the present time,—then those who are taxed for its support can be absolutely destroyed and it could acquire their properties through the forced contribution of its competitors exacted for the maintenance and support of those privileges to be exercised in the Millsaps Building which operated to their undoing.

This conception is not far-fetched or fanciful. At 5 per cent return on business property is standard, and the cost of doing business at the present time in Mississippi is frequently represented by a tax of more than 5 per cent. Therefore, this building could take the choicest tenant by cutting the price to a figure at which others could not compete, and having cut the price, they would be powerless to retaliate even though they were being taxed to death for the benefit of their competitor—though they were being killed by slow degrees that their competitor might live.

Section 20, Art. 12, of the Constitution of 1869, means that "all property" of a similar class must be taxed when any portion of that class of property is taxed. When the City of Jackson taxed the three-story Harding Building belonging to the Baptist Church, whose income was utilized for charitable purposes—christianizing the world—we take the broad position that Section 20 requires that this property, similarly utilized by the Methodist Church, in receipt directly of its revenue, and which could use its revenue without accountability for precisely the same purpose as the revenue coming to the Baptist church, the Harding Building, is used, and therefore be without accountability to any person, then that under Section 20, it is not competent for the Legislature to allow the easy evasion of Section 20 by incorporation.

Before the law, these two operations are equally meritorious, equally charitable, and neither can testify to an advantage.



age over the other, and when weighed in the balance before the law, when one is taxed, the other must be taxed under Section 20.

**Insurance Company v. French**, 109 Iowa, 585, holds:

"It will not do to say that the constitutional provision is a mere grant of power, to the legislature to impose taxes on corporate property. That power would exist in the absence of any constitutional grant. Indeed, it is fundamental that a state constitution is not a grant of power, but a limitation upon the powers of government. Generally speaking, a state may do whatever is not prohibited by its constitution. **Morrison v. Springer**, 15 Ia., 342. **Stewart v. Board**, 30 Ia. 18. The language quoted then, was a command or direction to the legislature in the execution of a power inherent in it in virtue of sovereignty, and that was that taxes levied on the property of corporations shall be the same as those imposed upon the property of individuals. In other words corporations shall bear the same burden of taxation as individuals, and the object and purposes of the tax shall be the same whether levied upon the property of individual or of a corporation. . . . As said by Beck, J., in **City of Dubuque v. I. C. R. R. Co.**, 39 Ia. 56: 'The end sought and attained thereby is equal and uniform taxation of the property of all the taxpayers of the State.' We frankly admit that no system of taxation has yet been devised which secures exact equality or uniformity. All attempts in this direction have been but approximations. Yet this is no reason for departing from the plain language of the constitution, which aimed at the destruction of favoritism and class legislation." (Bold Ours).

In Alabama, where the same constitutional provision exists, the Court said, in the **Adams Case**, page 275:

"All exemptions from taxation necessarily increase the burdens imposed on the property not exempt, and are directly injurious to the taxpayer. The incidental benefits which it is supposed may result to him, in common with the community at large, are speculative and not often a compensation for the immediate injury sustained. Invidious exemptions or discriminations, by which the property of an individual, or a corporation, is relieved from bearing a just proportion of the common burden taxation is intended to discharge, are violative of the equality of right of the citizen, which is a fundamental principle of our institutions. To prevent any exemption or discrimination in favor of corporations, to subject their property to the same rate of taxation to which the property of individuals of the same kind is subject, is the purpose of the constitutional provision, \* \* \* Temporary exemptions or discrimination in taxation in favor of corporations, to the prejudice of the individual citizen, within that section, was within the province of legislative power. These exemptions or discriminations could have been granted and would have continued until the inequality and injustice became so grievous that the people compelled the legislature to remove them. Temporary as the injury to the individual may have been, the fathers of the constitution did not intend it should ever exist. The 11th section was therefore added, in itself self-executing, without the aid, in fact in restraint, of legislative power, subjecting corporate property to the taxation imposed on individuals."

Furthermore, as said in the **Adams Case**, 71 Mass. 274:

"Subtlety and refinement and astuteness are not admissible to explain away the expression of the sovereign will. The framers of the constitution, and the people who adopted it, must be understood to have intended the words employed in that sense most likely to arise from them on first reading them." This is the doctrine

announced by Cooley and Story, and our construction of the meaning of Sec. 13, to-wit: That it required the property of private corporations for pecuniary profit to be taxed just as—the same as—the property of individuals, so that one would not be exempt and the other taxed, is the identical construction placed upon the same words by the Supreme Court of the United States, and the Supreme Courts of Alabama, Arkansas, California, Florida, and Iowa. We prefer now to distinctly align ourselves with the Supreme Court of the United States on this important question, and overrule **Mississippi Mills v. Cook**, in so far as it held that the property of private corporations for pecuniary profit was not, by the constitution of 1869, Sec. 13 and 20 of Art. 12, expressly directed to be taxed just as the property of individuals. The decisions of the United States Supreme Court, to which we refer, are as follows: **Louisville v. Palmes**, 109 U. S., 248; **St. Louis, etc., Railroad Co., v. Berry**, 113 U. S., 475; **Schurz v. Cook**, 148 U. S. 408; **Keokuk, etc., R. R. Co., v. Missouri**, 152 U. S. 303, and 310-312."

Turning to Arkansas, we find, in **Fletcher v. Oliver**, 25 Ark., 295, that the Supreme Court, approving **Adms v. Railroad Company**, 77 Miss. 275, held:

"The imperative command of the Constitution is, that the legislature shall tax, by a uniform rule, all property except that specifically enumerated as being exempt from tax by the express terms of the Constitution. \* \* \*

Taxing by a uniform rule, means by one and the same unvarying standard, uniformity not only in the rate of taxation but uniformity in the mode of assessment, by which the value is ascertained. There must be an equality of burden. This uniformity must be coextensive with the territory to which it applies. If a state tax, it must be uniform all over the state; if a county, township, city, town or district tax, it must be uniform throughout the

extent of territory to which it applies; the property within these legal subdivisions, established by law for the convenience of the people, must all pay homage to this one uniform rule. Each one of these subdivisions grew into existence to supply a want in society, or to afford protection to property and to owner, and to the support of each. The Constitution proclaims the owners shall contribute."

The power of the Legislature was not such as to vest in this corporation the right thus to be immune. As was said in **St. Louis, etc., Railroad Company v. Berry**, 113 U. S. 475:

"This new corporation did not come into existence until May 4, 1874. It came into existence as a corporation of the State of Arkansas in pursuance of its Constitution and laws, subject in all respects to their restrictions and limitations. Among these was that one (Art. 5, Sec. 48 of the Constitution of 1868) which declares that the property of corporations, now existing or hereafter created, shall forever be subject to taxation the same as property of individuals. This rendered it impossible in law for the consolidated corporation to receive by transfer from the Cairo and Fulton Railroad Company, or OTHERWISE, the exemption sought to be enforced in this suit. The case is thus brought within the rule declared and applied in **R. R. Co. v. Palmes**, 109 U. S. 244."

The court will perceive that there it was held to be impossible for this corporation to receive the exemption from taxation from the predecessor railroad "or otherwise." In short, thereunder, by the provision of the Constitution, the railroad property was made absolutely subject to taxation. See, also, **Railroad Company v. Palmes**, 109 U. S. 244. Both of these cases are quoted with approval in the *Adams Case*, wherein it was held that our Constitution was substantially similar and substantially operative in the premises.

Again, in **Keokuk & W. R. Co. v. Missouri**, 152 U. S. 310, 38 L. Ed. 455, the Court, by Mr. Justice Brown, said:

"As was said of an Arkansas corporation in **St. Louis I. M. & S. R. Co. v. Berry**, 113 U. S. 465, 475 (28:1055, 1058), 'It came into existence as a corporation of the State of Arkansas, in pursuance of its constitution and laws, and subject in all respects to their restrictions and limitations. Among these was that one which declared that 'the property of corporations, now existing, or hereafter created, shall forever be subject to taxation the same as property of individuals.' This rendered impossible for the consolidated corporation to receive by transfer from the Cairo & Fulton Railroad Company, or otherwise, the exemption sought to be enforced in this suit.' See also, **Memphis & L. R. Co. v. Berry**, 112 U. S. 609, (28:837); **Shields v. Ohio**, 95 U. S. 319 (24:357); **Louisville & N. R. Co. v. Palmes**, 109 U. S. 244, (27:922)."

In **Y. & M. V. Railroad v. Vicksburg**, 209 U. S. 362, 52 L. Ed. 834, it was said:

"The Adams case came here on writ of error to review the judgment of the Supreme Court of Mississippi in the same case. 77 Miss. 194, 60 L. R. A. 33, 24 So. 200, 317, 28 So. 956. The Mississippi court, whose judgment was affirmed in this court, held that a grant of exemption from taxation to a railroad company was void under the Constitution of 1869 of that state, and that the organization of a consolidated company under the Constitution of 1869 cut off an exemption from taxation granted to a constituent company prior to the adoption of that Constitution."

Counsel are in error in assuming that those decisions upon which they rely, namely **People v. Coleman**, 4 Cal. 46, and **Hugh v. Shoemaker**, 22 Cal. 363, cited by Judge Campbell

in **Mississippi Mills v. Cook** stand as adopted by this Court. On the contrary, **People v. McCrary**, *supra*, stands as approved and integrated into the jurisprudence of Mississippi by express adoption in **Adams v. Railroad Company**, 77 Miss., *supra* 1

Again, in **Adams v. Bullock**, 94 Miss. 32, this Court said

"This franchise is the property of a private corporation organized for pecuniary gain, and under Section 181 of the Constitution, is taxable in the same way and to the same extent as if owned by an individual . . . If owned by an individual, this franchise would be taxable as property not comprehended under the list as 'capital invested in merchandise and manufacturing.' Therefore, since under Section 181 of the Constitution corporations of this class are to be taxed as individuals, the franchise being owned by a corporation is none the less liable."

As said in **Cooley on Taxation**, page 275

"The Constitution as revised afterwards contains a provision that 'the property of corporations now existing, or hereunder created, shall forever be subject to taxation, the same as property of individuals,' etc. Under this provision, it is not competent to provide by law that the taxation of the property of corporations, or of any class thereof, shall not exceed a certain percentage which is below the limit to which the taxation of other property is restricted."

In the case of **Vicksburg Bank v. Worrell**, 67 Miss. 47, the Court said

"The Legislature may select the subject of taxation, and everything not designated as taxable is exempt for the time being. The subjects of taxation may be classified at the discretion of the legislature, and if all of the

same class are taxed alike, there is no violation of the equality and uniformity required by the Constitution."

The case of **Murray v. Lehman**, 61 Miss., 283, in our judgment, practically forecloses this case. In that case, the Legislature of the State of Mississippi, while the Constitution of 1869 was in force, passed a special act, constituting the County of Warren a separate circuit and chancery court district, and provided for the payment of a docket fee in each case. The Supreme Court of Mississippi held that such act violated Section 20 of the Constitution of 1869, using the following language:

"The docket fee required by the act under consideration is a tax, and while imposed in only a given county, is devoted to a state purpose, viz.: The payment of the salaries of the judge and chancellor of that district. It is true that this tax is not on property, but on court proceedings, yet the fact remains that it is an invidious local discrimination confined to particular courts, and not applicable to the counties and courts of the state generally. It violates the rule of equality and uniformity prescribed for the whole state by the constitution, by imposing on those having the expense of proceedings in Warren County an additional burden to compensate the judge and chancellor, when persons similarly situated elsewhere are not thus taxed. It prescribes a different rule for different localities, without a difference in the situation and circumstances of the localities, and, because of the difference of place, requires what is not required for exactly the same thing in other localities. It is for the legislature to select the subjects of taxation, but to impose on suitors and all interested in proceedings in courts in one county the expense of maintaining courts not peculiar to it, and the expense of which elsewhere is a charge on the state treasury, is to depart from the con-

stitutional rule of equality and uniformity in taxation throughout the state. This rule requires that persons in the same class, and property and rights of the same kind shall generally be subjected alike to the same common burden. There must not be local exactions, except for peculiar local advantage. There can not be a higher tax on property in Warren County for state purposes than in other counties, nor can those bearing the expense of proceedings in the courts in that county be compelled to contribute to pay for what is a state purpose what is not exacted from persons similarly situated elsewhere. It is an unfair discrimination between subdivisions of the state, which are entitled to equal rights and upon equal terms as to all the tribunals created by the constitution for all the counties. If the purpose for which the exaction is made was peculiarly local, it might be justifiable, but this is not its character. The scheme is to impose on persons having proceedings in the courts in Warren County the burden of making compensation for the services of the circuit judge and chancellor of the state, who is charged with the duty of holding the courts in that county. It is a discriminating imposition in a particular county for a general purpose common to the state. Those on whom the docket fees fall are made to contribute to a state object in a mode not required of any except those concerned in proceedings in a particular county. It is of the essence of all taxation that it should compel the discharge of the burden by those on whom it properly rests. The expense of maintaining judges and chancellors, according to the plan adopted, rests on the state and not on suitors. There is no exemption of persons or property in Warren County from taxation for raising money for the state treasury, out of which the salaries of judges and chancellors in other districts are paid, but persons and property in that county are taxed as in other counties for all state purposes. So that while persons



and property in Warren County contribute their full proportion to the revenue of the state, the proceedings in the circuit and chancery courts held in that county are placed under contribution for the support of the state courts held there. The appellant is a citizen of Warren County, possessed of taxable property there, and is therefore a contributor, by taxation for state purposes, to the treasury, out of which are paid, for their services, circuit judges and chancellors for other districts, and yet, he is denied access to the circuit court in the county of his residence, except upon terms not applicable in other counties to maintain courts in which he is a contributor. He is taxed to maintain courts throughout the state, and taxed on his suit to maintain them in Warren County, and may be taxed on property or business to pay the salaries of the judge and chancellor in that county, for if the docket fees and license fees are not sufficient, the required amount is to be raised by county taxation."

In the case of **Board of Trustees v. County** (Wis.) 136 N. W. 619, the facts are copied in the opinion as follows: "The plaintiff educational corporation, created by the territorial Legislature of Wisconsin in the year 1847. By Chap. 116, Laws of Wisconsin for 1901, the plaintiff's charter was amended in several respects, and by Sec. 8 of this act, its board of trustees was authorized to 'hold free of taxation any lands or other property acquired by donation, bequest or purchase and held expressly for educational purposes and for the endowment of the institution.' At the time of the enactment of the statute last mentioned, there existed and was in force in this state Section 1038, Stats. 1898, which related to property exempt from taxation, and, among other things, provided the following: 'Personal property owned by any religious, scientific, literary or benevolent association and the real property, if not leased or otherwise used for pecuniary profit, necessary for the location and convenience of the buildings of such association and embracing the same, not exceeding ten acres, and the lands

reserved for grounds of a chartered college or university, not exceeding forty acres."

The court held that the act was unconstitutional, violating the uniformity clause, using the following language:

"When we are presented with a case in which the exemption is arbitrary, and in which other persons in the same class, owning property of the same general description, are awarded exemptions of a lesser amount, the situation is one in which the rule of uniformity is violated. It is impossible, under the most liberal rule of classification, to sustain it as a classification, because the class is already made, and the situation is one in which a different amount of exemption is allowed to one person of the class than to others of the same class. For example, in Section 1038, Subdivision 11, there is an exemption from taxation of wearing apparel, family portraits, etc., not exceeding in value \$200.00, and kitchen and other household furniture, not exceeding in value \$200.00. Here, the class is determined by description of the property exempted. The rule of uniformity would be destroyed by an additional provision that certain persons of the same class should have \$800.00 exemptions of this class of property. So, where the class consists of the property of certain persons described as religious, scientific, literary or benevolent associations except one or more naming them. The legislature had, by Section 1038, for the purpose of providing exemptions, created a class consisting of chartered colleges or universities, and prescribed the exemptions for that class. Aside from the Act of 1901, the plaintiff is entitled to all the exemptions of that class found in Section 1038. Plaintiff unquestionably belongs to the class entitled to these exemptions. There is, as we view it, by the Act of 1901, conferred upon the plaintiff, arbitrarily, and not as a class, an additional exemption from taxation, based on no distinctive feature

the person receiving the exemption or the property exempted. It is very plain that the rule of uniformity mentioned in the Constitution does not relate alone to the rate or percentage of taxation. It is equally obvious that the rule of uniformity may be as effectually abrogated by arbitrary exemptions from taxation as arbitrary impositions of unequal amounts. The words of the Constitution, while recognizing the power of the legislature to designate the property upon which taxation shall be laid, limit this power in some degree by the requirement that the rule of taxation shall be uniform. The section of the Constitution mentioned must stand in its full integrity, and the designation of property to be taxed is to be exercised by obedience to the commands that the rule of taxation shall be uniform. The authorities hereinbefore cited sufficiently show that this court has endeavored in the past to adhere to this construction of the statute, recognizing, however, in the legislature a broader power of classification for the purpose of designating what property shall be taxed than is ordinary possessed in relation to other subjects requiring classification."

**Baltimore v. Starr Methodist Church, (Md.) 67 Atl. 261.**

The legislature of the State of Maryland passed a special act, exempting from taxation of all property belonging to the Starr Methodist Church, Baltimore, Md. Under the uniformity clause of the Constitution of the State of Maryland, the court held that the act was unconstitutional, using the following language:

"It is apparent that the constitutionality *vel non* of Acts 1904, p. 474, c. 263, lies at the root of this contention, and as the determination of that question will settle the entire matter, we will confine this discussion to that point, because, if null and void, it confers no exemption upon the property in question from assessment and taxation for municipal purposes. In support of the appellant's posi-

tion, reference is made to the Declaration of Rights, Art. 15, which provides that: "Every person in the state or person holding property therein, ought to contribute his proportion of public taxes for the support of the Government according to his actual worth in real or personal property; yet, fines, duties or taxes may properly and justly be imposed or laid, with a political view, for the good government and benefit of the community." This provision has, with a slight but not material change of phraseology, been a part of the organic law of Maryland for considerably more than a century. Its predominant object is to provide by a fixed enactment equality in taxation, and to prevent, as far as possible, the burden of supporting the government from falling upon some individuals to the exclusion or exemption of others. It prohibits unjust discriminations, and whilst it remains in force, the land owner, be his possessions large or small, will have an absolute and complete guaranty that public taxes can not be imposed upon him, while others who are equally responsible in the law may have themselves relieved of this burden by the partiality of legislative enactment, without subserving any public policy. Its theory is that the distribution of the burden over every class of property alike will lessen the proportion of each individual's contribution, whereby oppressive exactions from the owners of any particular class of property will be impossible. This has been the uniform and consistent principle always followed in Maryland, eminently just in itself as a sound and long accepted axiom of political economy. It has been incorporated in her organic law since November 3, 1776. It has been upheld by her courts, and steadily and tenaciously adhered to by her conservative people. The Act of 1904, not only under the construction placed upon it by the appellee, but palpably, by reason of its exemption attempts to overthrow this salutary principle and to disregard Article 15 of the Declaration of Rights, and to substitute a novel and experimental scheme, which, if

suffered to obtain a foothold, will inevitably lead to ruinous consequences. If the legislature may lawfully do this in this particular instance, why not in another, and another, until there would be an almost indefinite number of exemptions, and we think such acts should be stricken down as null and inoperative, repugnant to the organic law and prolific of obvious abuses."

Again, on page 264, the court used the following language:

"The exemption does not apply to a species or class of property, but to one piece of property only, leaving all other property of the same class or species subject to taxation, and for no other reason except the purely arbitrary one of the benefit or personal favor to the appellee, and no one else. **Wells v. Hyattsville**, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89. And, unless the discrimination be arbitrary, then the wisdom of the exemption is within the discretion of the legislature, and is not subject to control by courts. **Simpson v. Hopkins**, 82 Md. 489, 33 Atl. 714. This can only mean that if the discrimination is arbitrary, then it is subject to control by the courts. So that, where the revenue producing property of all other churches continues taxable, and the revenue producing property of this church is made exempt, such exemption can be nothing else than an arbitrary discrimination between the property of the appellee and all other property of the same species or kind held by similar corporations, and such an arbitrary exemption must be void under Article 15 of the Declaration of Rights. No only is it unlawful for the legislature to exempt one man's property and tax another of exactly the same kind, but the legislature may not impose a tax upon the property of one person at one rate and upon the property of another at a different rate. A fortiori, the legislature should not tax the revenue producing property of all churches except one, and for this, prescribe, not a differ-

ent rate, but no rate at all; in other words, exemption. **State v. P. W. & B. R. R. Co.**, 45 Md. 361 24 Am. Rep. 511 So. this court has held in **Wilkins County v. Baltimore City**, 103 Md. 293, 63 Atl. 562. The state has full power to exempt any class of property as it may deem best, according to its views of public policy. It can not be now questioned that a state may classify property in all proper and reasonable ways, provided the discriminations are based upon sound reasons of public policy, and are not arbitrary or hostile. Justice Field said, in **Santa Clara v. Southern Pac. R. R. Co.**, (C. C.), 18 Fed. 385, referring to the guaranty of equal protection: "It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. \* \* \* Equal protection is the same protection under the same circumstances; all are to stand alike in like intrinsic conditions."

"Again, in **Railway Co. v. Ellis**, 165 U. S. 151, 17 Sup. Ct. 261, 41 L. Ed. 666, Justice Brewer says: "In all cases, it must appear, not only that a classification has been made, but, also, that it is one based upon reasonable grounds,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection."

In **Commonwealth v. Hampton Institute**, 106 Va. 611, 38 S. E. 449, a similar question was involved. The Hampton Normal & Agricultural Institute was incorporated by an act of the General Assembly, approved June 4, 1870. Section 10 of the Charter provided that "any property held by the Hampton Normal and Agricultural Institute for legitimate purposes shall be exempted from taxes so long as property held by other institutions of learning in Virginia for their legitimate purposes is exempted, and whenever a tax shall be

laid upon the same, if laid at all, this tax shall not be higher on said institution in proportion to the value of its property than on other institutions of learning in this state."

Section 10, Article 10, of the Constitution of Virginia of 1869, in effect when the charter was granted, provided that "taxes, except as hereinafter provided, whether imposed by the state, county or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."

Certain property of the institution having been assessed for taxation, a controversy arose as to its liability therefor. The institution claimed the property was exempted under the section of the charter above noted. The Supreme Court held that it was the purpose of the section quoted to place the property of the Hampton Institute in respect to its liability to taxation upon the same footing upon which all other educational institutions of the state should or might thereafter be placed by law, and responding to the contention that the charter granted an exemption of all property to the institution, said:

"If Section 10 of the Charter of the institution is susceptible of the construction which its counsel place upon it, then it was evident that it was in conflict with the Constitution of Virginia in force at the time of its enactment.

"Section 1 of Article X of the Constitution of Virginia [1869] then in force, provided as follows: 'Taxation, except as hereinafter provided, whether imposed by the state, county or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be

taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.'

"Any law which would operate to exempt all the property of one educational institution from taxation, while large portions of the property of all the other educational institutions in the state were subjected to taxation, would be absolutely void under the constitution in force in 1870, because such taxation would be neither equal or uniform, and because one species of property from which a tax might be collected would be taxed higher than other species of property of the same descriptions and of equal value."

The case of **Mississippi Mills v. Cook**, *supra*, as approved in the Adams case, holds that it is beyond the power of the legislature to make a contract by which property belonging to a corporation shall be exempt from taxation. The legislature was besought, and being besought, had yielded time without number to importunities for immunity. Now that which, with deference, was done was to make property of a particular class, when taxed, taxable to all alike, and to preclude the possibility of favoritism by the legislature, and placing the burden otherwise, than equally; otherwise, than uniformly. The Legislature of the State of Mississippi selected as that which was to be taxed, irrespective of ownership, business blocks. Here there is such a business block, and the question arising is, with the command from the people that the legislature must needs tax all property in proportion to its value, when it taxed a business block utilized for business purposes belonging to one, could it thereafter immunize a business block belonging to another? Given the identical character of property, identically situated on the same street, and almost on opposite corners, can the Legislature contract that the property of the Methodist Church, wherefrom it can



take the income without accounting, is to be immune, while the business block of the Baptist Church is to be taxed? We have not, in our opinion, anything that would authorize a favoritism, an immunity of this kind and of this charter.

In discussing cases, it is for the court to confine itself to the precise point presented for decision, and confining itself to the precise point for decision, to make that and that alone an adjudication. It is powerless to do more, and doing more, of necessity, comes of evil. Here, the sole point in this case is: (1) Has Millsaps College the right under its charter to acquire and hold this property? (2) If it has, is such property immune from taxation? (3) and lastly, is such charter, as to the State's power of taxation, an irrepealable exemption which rises superior to the power of the legislature and, although the Legislature confessedly has sought to tax, desires to tax, and has demanded that taxes be paid on this specific kind of property, yet so demanding is powerless to enforce its demand because at a prior time a predecessor legislature endeavored to contract away the power of the state so thus to tax?

This further thought: Just as it could never be contemplated that the Mississippi Mills would acquire outlying lands for purposes of profit, as pointed out in **McCulloch v. Stone**, *supra*, just so here it ought not to be imputed to the Legislature that they would anticipate that this corporation would acquire outlying business blocks for the purpose of resale at a profit, for the purpose of collecting rents, and then to claim that these were exempt along with the property so specifically and definitely limited in the charter itself as a part of the institution. Therefore, the amending act in **Mississippi Mills v. Cook** did not in any wise impair or raise a question as to the validity of the exemption of that which was specifically and purposely exempted by the act of 1872, but merely precluded the enjoyment of an exemption upon property that was outlying.

In **Adams v. Tombigbee Mills**, 78 Miss. 676, the houses of the company erected on outlying land were held not exempt under the act of 1882.

There was no question raised by the act of 1877 in *Mississippi Mills Case* of the principal exemption, but what the Court did hold, and held properly was, that there was no charter power conferred under which Mississippi Mills could acquire outlying land and hold those outlying lands for its corporate purposes and not pay taxes upon them just as other persons paid taxes. In short, payment of taxes could not be avoided by the Legislature through the grant of a corporate charter when, under the Constitution, property had to be taxed, and this has been construed to mean not only property of a specific kind and character is **subject** to taxation by the Legislature, but that all of the character taxed must be taxed, irrespective of the ownership. To allow an exemption on the ground of a personal privilege to the owner would be to destroy the fundamental principle of personal equality before the law.

In **Adams v. Bank**, 78 Miss. 536, this Court declared

"Prior to the adoption of section 112, Constitution of 1890, the 'uniformity and equality' clause of the Constitution of 1869 had been the subject of repeated judicial interpretation. In a line of decisions beginning with **Daily v. Swope**, 47 Miss. 367, including **Vassar v. George**, 47 Miss. 713, **Mississippi Mills v. Cook**, 56 Miss. 40, **Vicksburg Bank v. Worrell**, 67 Miss. 47, and other cases, the court had gradually come to a judicial expression of the view that 'the subjects of taxation may be classified at the discretion of the legislature, and if all of the same class are taxed alike, there is no violation of the equality and uniformity required by the Constitution.

"The conclusion of the court announced in these cases was accepted and uniformly acted upon prior to the adoption of the Constitution of 1890."

Therefore, we have all other business blocks taxed; this business block is not taxed, and its failure to be taxed arises under an alleged grant made by the Legislature, but under the Constitution of 1869, the power thus to contract did not exist.

See, also, **Y. & M. V., etc. v. Adams**, 81 Miss. 90. Note, furthermore, **Murry v. Lehman**, 61 Miss. 285. In **State v. Simmons**, 70 Miss. 485, there was a litigation which, also, involved Mississippi Mills, and thereunder has been established our fundamental rule as to corporate taxation. The Mills set up their charter exemption there but it was disallowed, and of such exemptions, the Court said:

"The rule is well settled that the words of a charter are to be considered rather as those of the incorporators than of the state; that exemptions, when claimed, must be found to exist from the language employed, construed most strongly against the party and most favorable to the state, and that no exemption not clearly given, or existing from necessary inference, can be allowed. Counsel assume that the words, 'real and personal property' used in the thirteenth section of the charter, mean real and personal property other than the capital stock or franchise of the corporation; and, having thus excluded these from liability to taxation as real or personal property, finds an implied exemption of it from taxation upon the rule that the Legislature, having stipulated how the real and personal property should be taxed, thereby bound the state not to tax the franchise. This construction carries the rule **expressio unius est exclusio alterius** beyond all reasonable limits, and its application would be to subvert

or ignore the fundamental principles of construction of charters. We find nothing in the charter precluding taxation of the capital stock of the company."

As said in **State v. Tonella**, 70 Miss. 710:

"The primary purpose in all just schemes of taxation is to distribute its burdens equally and uniformly upon all persons and property, and the requirement of our Constitution that all property shall be taxed in proportion to its value, is but the statement in another form of the provision that taxation shall be equal and uniform. If all property was assessed at one-half or one-third its value, the rule of uniformity of taxation would not be distributed."

These constitute all of the decisions bearing upon Section 13 and Section 20 of Article 12 of the Constitution of 1869, and they all support our position, and the opinion of Judge Potter.

While it is true that the Supreme Court of Mississippi specifically did not pass upon this Constitutional question, it is imperative that this Court so do before it may reverse. Otherwise, this Court will be guilty of an assumption that the contract exists and existence is not possible when the Constitution which conditions all taxation prohibited this immunization. To take jurisdiction requires that this Court decide this question adversely to the city before it can hold that the contract is impairable.

Wherefore, we respectfully submit that this Court is without jurisdiction, but if it be that the Court shall take jurisdiction, then, with the utmost deference, Section 5 violates the Constitution of 1869, and is void, but if not, then the con-

struction thereof by the Supreme Court is eminently proper and should be followed by this Court as a correct interpretation of a local State statute.

Respectfully submitted,

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